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ARTICLES

On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism Under the United Nations Charter

ANTONIO F. PEREZ[†]

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I. PREFACE

In the last few years, with the dissolution of the former Soviet Union¹ and the reunification of Germany,² it has become commonplace for statesmen and diplomats to think, and even to do, the previously unthinkable. The Security Council of the United Nations, in particular, has transcended received understandings of the limits of its powers.³ Now international lawyers believe they face, within the framework of international law as they understood it, a "legitimacy" crisis concerning the Security Council.⁴ But the crisis may be less in the Council than in the profession of international law.

International lawyers have correctly perceived discontinuities between the law as they understood it and the current practice of the Council. However, these discontinuities are not illegitimate, nor are they merely the fulfillment of the immanent possibilities for collective action under the Charter as it was originally conceived.⁵ Rather, this new collective action would indeed be unlawful, but for constitutional change in the Charter achieved by the emergent supranational political community—in other words, an informal amendment to the Charter attained through supranational constitutional politics responding to the end of the Cold War.

Approaching the problem of the legitimacy of the Security Council's recent outbursts in the exercise of raw power from a constitutional standpoint invites the beginnings of a new dialogue between constitutional law scholars of federalist theory and international law scholars of the law of the United Nations Charter. Drawing on analogies to the emergence of federalist constitutionalism in the United States in the 1780s and in the European Community—now Union—in the 1990s, it is possible to articulate a theory of a supranational constitution;⁶ and, building on the Charter's tentative location of sovereignty

1. See Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, Republic of Belarus-RSFSR (the Russian Federation)-Ukraine, 31 I.L.M. 143; Protocol to the Agreement Establishing the Commonwealth of Independent States, Dec. 21, 1991, *id.* at 147; Alma Ata Declaration, Dec. 21, 1991, *id.* at 148 (reconstituting the Commonwealth of Independent States (the "CIS") to include all the states of the former Soviet Union except for the Republic of Georgia). For additional constitutive documents of the CIS, see Minutes of the Meeting of Heads of Independent States, Dec. 21, 1991, *id.* at 149; Agreement on Coordinating Bodies of the Commonwealth of Independent States, Dec. 21, 1991, *id.* at 150; Decision by the Council of Heads of State of the Commonwealth of Independent States, Dec. 21, 1991, *id.* at 151.

2. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 (entered into force Mar. 15, 1991).

3. See, e.g., S.C. Res. 678, U.N. SCOR, 45th Yr., Res. & Dec., at 27, ¶ 2, U.N. Doc. S/INF/46 (1990) (authorizing collective action to enforce the Security Council's demand that Iraq withdraw from occupied Kuwait); S.C. Res. 688, U.N. SCOR, 46th Yr., Res. & Dec., at 31, U.N. Doc. S/INF/47 (1991) (authorizing international action to protect the Kurdish people within Iraq); S.C. Res. 733, U.N. SCOR, 47th Yr., Res. & Dec., at 55, U.N. Doc. S/INF/48 (1992) (imposing an arms embargo on Somalia based on the conclusion that the humanitarian crisis in Somalia posed "a threat to international peace and security"); S.C. Res. 940, U.N. SCOR, 49th Yr., Res. & Dec., at 51, U.N. Doc. S/INF/50 (1994) (authorizing collective action to depose *de facto* authorities in Haiti).

4. For important critiques of the legitimacy of Security Council action, see, e.g., Burns H. Weston, *Security Council Resolution 678 and the Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991) (questioning the initial authorization of enforcement action by the U.S. with respect to Iraq); and David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993) (critiquing the so-called "reverse veto," under which once the Security Council authorization is given for enforcement action, such as with respect to Iraq, the veto by one Permanent Members, such as the United States, prevents the international community from disempowering the Permanent Member exercising its veto from lawfully undertaking further enforcement action).

5. See, e.g., Jose E. Alvarez, *The Once and Future Security Council*, WASH. Q., Spring 1995, at 5, 6 (noting that the Charter never worked as intended and that, contrary to popular wisdom, it is not working now as it was originally intended).

6. See *infra* Part V.

in the “peoples” of the world and the dualities of their political expression—sometimes characterized best as interest group or normal politics, other times seen better as a form of high politics capable of making higher law—it is possible to explain constitutional change by these “peoples” outside of the formal processes set forth in the Charter itself.⁷

But if there was a constitutional moment, what did the amendment look like? A first effort at formulating a statement could be made in terms of the generalization of the right of self-determination,⁸ which, given the text and history of the original Charter, would explain the revaluation of the Council’s powers for collective intervention.⁹ The expansion of these powers would then require reconstructing the Charter text, which links self-determination and collective security through the rule against intervention in the domestic jurisdiction of states except in the event of enforcement action.¹⁰ With the Security Council’s expanded powers following the Charter’s amendment, the domestic jurisdiction principle would be translated, in the language of the Charter’s collective security provisions, into a principle confining the Council’s exercise of its responsibility over collective security under Chapter VII to the use of Chapter VIII regional organizations with Council approval in a way that, like federalism in the domestic context, strengthens supranational democracy.¹¹ Finally, because collective intervention would proceed with greater democratic legitimacy, its increased community adherence would then entail a corresponding re-understanding of the Charter’s regime for sharing the costs of collective action among the members of the supranational community.¹² As each of these changes can be explained in terms of the different reasons that have been employed to construct relations between the integrated political community and its constituent parts in a federalist integration of sovereignty, it will be necessary to lay the groundwork for the reconstruction of the Charter by explicating the arguments based on community, liberty, and utility for the survival of constituent units in a federalist integration,¹³ each of which, in turn, is tied to the corresponding—historicist, natural law, and positivist—justifications for the legitimacy of any political authority.¹⁴

This Article thus will move from a general account of different principles of legitimation, to the correlative principles for relating states to the United Nations (U.N.) under a federalist theory of a supranational constitution, and to an account of how supranational constitutional politics could legitimately amend the Charter. With the theoretical structure emplaced, the Article then proceeds to describe the constitutional processes amending the Charter, closely analyzing the Secretary-General’s *Agenda for Peace*¹⁵ and the response of the U.N. organs and members which subsequently confirmed its constitutional significance. Finally, the Article demonstrates the content of the amendment to the Charter through a sequential survey of transformations of the traditional law of self-determination, collective action, and sharing of the burdens of collective action among the members of the U.N. It then concludes with an assessment of the effect the amendment of the U.N. Charter has had on U.N. policy-making in the critical test case of Yugoslavia.

7. See *infra* Part VI.

8. See *infra* Part VII.

9. See *infra* Part VII-A-2.

10. See *infra* Part VII-B-1.

11. See *infra* Parts VII-B-2-5.

12. See *infra* Part VII-C.

13. See *infra* Part V.

14. See *infra* Part IV.

15. UNITED NATIONS, GENERAL ASSEMBLY, AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING; REPORT OF THE SECRETARY-GENERAL PURSUANT TO THE STATEMENT ADOPTED BY THE SUMMIT MEETING OF THE SECURITY COUNCIL ON 31 JANUARY 1992, U.N. Doc. A/47/277 (1992) (also published as U.N. Doc. S/24111) [hereinafter AGENDA FOR PEACE].

Before turning to the argument, it is necessary to describe the problem this article is intended to resolve. For this description to be effective, we must outline the traditional law of nonintervention, as it was transformed and revived in Article 2(7) of the U.N. Charter. We must also show that the new collective intervention cannot be explained in terms of the traditional tools of treaty interpretation, including the Charter's text and history or subsequent practice, leaving only the possibility of illegitimacy or a new hermeneutic based on constitutional theory.

Is the process described in this Article merely metaphor or bad "social poetry"? Perhaps it is,¹⁶ but this process may well be the first inklings of a return to the ancient and grand ideal of the polis but with a new civic forum functioning truly for the first time on a global scale.

II. NONINTERVENTION—THE EVOLUTION OF AN IDEA

The principle of noninterference in the internal affairs of states flows both from customary law emerging from formative events in the classical period of the development of international law and from the mandates of twentieth century treaties, particularly the U.N. Charter. This Part will argue that the U.N. Charter, building on the weak version of the nonintervention doctrine of classical international law, enshrined nonintervention as a basic norm limiting the U.N.'s collective security functions to exclude pro-humanitarian and pro-democratic intervention.

A. *One Hundred Years of False Nonintervention*

Classical, or nineteenth century, international lawyers developed a doctrine of nonintervention in rebellion against the republican theories of their forebears. The earliest publicists of international law, from the republican premises from which their doctrine flowed, would have found the concept of nonintervention anomalous.¹⁷ For example, Christian Wolff's *civitas maxima* presumed the existence of a broader polis than the political communities of eighteenth century European states.¹⁸ Wolff held that "[i]n the *civitas maxima* [the supreme state], the nations as a whole have a right to coerce the individual nations if they should be unwilling to perform their obligations"¹⁹ Indeed, it has recently been suggested that Wolff's conception of international law, in drawing from medieval notions of political community and thus emphasizing a republican dimension,

16. See Philip Allott, *Self-Determination—Absolute Right or Social Poetry?*, in MODERN LAW OF SELF-DETERMINATION 177 (Christian Tomuschat ed., 1993). Allott argues that, despite the impulse to find "some sort of Higher International Law," the quest "obviously surpasses the systematic possibilities of the existing international system." *Id.* at 207. He adds: "Real-world behavior since 1945 provides no evidence that any coherent idea of self-determination has, as a matter of fact, installed itself as a higher value or higher law in international society." *Id.* at 209. And he claims that self-determination "is simply not appropriate to form the content of a higher value, let alone higher law. As a social phenomenon, we have seen that self-determination is merely an endless and inevitable social process within the general phenomenon of socializing." *Id.*

17. Grotius, for example, wasted no ink at all on the subject, since he believed international society was a community constituted of states and individuals in which individuals would have rights against their state that would be questions of international law. See Hedley Bull, *The Grotian Conception of International Law*, in DIPLOMATIC INVESTIGATIONS: ESSAYS IN THE THEORY OF INTERNATIONAL LAW 68 (Sir Herbert Butterfield & Martin Wight eds., 1966); see also R.J. VINCENT, NONINTERVENTION AND INTERNATIONAL ORDER 24 (1974).

18. See Nicholas G. Onuf, *Civitas Maxima: Wolff, Vattel and the Fate of Republicanism*, 88 AM. J. INT'L L. 280 (1994).

19. Wolff, *Prolegomena*, para. 13, *Ius Gentium Methodo Scientifica Pertractatum*, 1764 (Drake trans., 1934), quoted in VINCENT, *supra* note 17, at 28. Vincent argues nonetheless that Wolff advanced the eighteenth century's most anti-interventionist theory of international law. *Id.* at 46.

influenced the Framers of the U.S. Constitution to establish a federal union of states to further the connection between the *civitas maxima*, their supranational "polis, and the political life of citizens."²⁰

Because the roots of the doctrine of nonintervention in classical international law can be seen in Vattel's elevating the liberty of states to a central role, restraints on intervention were essentially prudential.²¹ The elevation of the state signalled the death of republicanism as a theory of international law.²² But more importantly, it framed the nineteenth century debate on nonintervention in terms of the balance of power between states, rather than a supranational association integrated by social solidarity. Therefore, after the French revolutionary war and the settlement at the Congress of Vienna, states formulated doctrines of nonintervention in response to attempts at intervention justified by the claim that changes in the internal structure of a state would upset the balance of power and thereby threaten other states.²³ Pro-interventionist theories of the Holy Alliance of Eastern and Central European monarchies drew the connection, as the earlier theories of supranational republicanism might have, between domestic and international legitimacy.²⁴

Nonintervention as a general theory thus had its origins in an effort to make England and Europe safe for nonabsolutist principles of government.²⁵ Indeed, in articulating nonintervention doctrines during the nineteenth century, nonintervention's foremost advocates constructed their argument in terms of advancing democratic government.²⁶

20. See Onuf, *supra* note 18, at 287–92.

21. See E. DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* [hereinafter VATTTEL, *THE LAW OF NATIONS*], Preface 9a–10a (Charles G. Fenwick trans. 1916) (1758) (serving, its title notwithstanding, as the basis for a positivist conception of international law); see also VINCENT, *supra* note 17, at 29.

22. As Onuf observes, Anne-Marie Slaughter failed even to mention republicanism in a recent summary of the state of theoretical scholarship in international law. See Onuf, *supra* note 18, at 280 n.5. (citing Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993)).

23. Two important cases required the formulation of doctrine. First, the embryonic republican French state issued a Decree on Nonintervention on April 13, 1793, a commitment not to intervene in other state's affairs that in effect overturned the National Convention's earlier threat on November 19, 1792 to "assist all peoples who shall wish to recover their liberty." See VINCENT, *supra* note 17, at 65–68. At the same time, Abbe Gregoire submitted to the Convention in June 1793 a Declaration of the Law of Nations, in effect substituting the rights of peoples for the rights of man as they were articulated in the 1789 Declaration of the Rights of Man and the Citizen. *Id.* at 64–65. Natural law conceptions of the equality of states and practical considerations, such as the need to induce nonintervention by European powers in the course of the French revolution through a promise of reciprocal self-restraint by France, motivated these two Declarations. *Id.* at 65–69.

A second episode was Lord Castlereagh's State Paper of May 5, 1820, which was intended to dissociate Great Britain from the Holy Alliance's threat to intervene in Spain in favor of Legitimist forces. *Id.* at 75. In it, Castlereagh formulated a doctrine of nonintervention as simply the obverse of the purposes of the settlement of the Congress of Vienna, which, he argued, had achieved European security through the formation of an alliance that would assure against French expansionism rather than the establishment of a collective security regime that would guarantee the internal order of states as the price of ensuring international stability. *Id.* at 76.

24. The pro-interventionist theory of Holy Alliance treated internal governance as intrinsically a matter of international concern, because the survival of the monarchical orders in one state required the suppression of republicanism everywhere. See generally HENRY A. KISSINGER, *A WORLD RESTORED: METTERNICH, CASTLEREAGH AND THE PROBLEMS OF PEACE 1812–1822* (1979); see also HENRY A. KISSINGER, *DIPLOMACY* 78–102 (1994) [hereinafter KISSINGER, *DIPLOMACY*].

25. Canning and Palmerston thus, according to Vincent, interpreted the nonintervention doctrine in a way to permit them to facilitate the emergence of democracy. VINCENT, *supra* note 17, at 90–91; see also RENE ALBRECHT-CARRIE, *A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA* 43–48 (rev. ed. 1973) (discussing British policy supporting Russian intervention favoring Greek independence—an early and anomalous case, given the conflict with the Legitimist ideology of the Holy Alliance, of intervention in support of self-determination).

26. This was consistent with the utilitarian premises of "international law," as it was entitled and conceived by Jeremy Bentham in the 18th century, in direct opposition to the natural law foundations of the Roman *jus*

Cobden, for example, opposed even pro-democratic intervention mainly because he judged that intervention would not succeed and that, even if it could succeed, it would undermine Britain's larger commercial interests or divert her from domestic matters. He argued that a noninterventionist policy would, in the long run, be better able to stimulate the expansion of British-style democracy.²⁷ Nonintervention thus became less a principle of international governance than an instrument to permit states to achieve domestic goals legitimized by the balance of power system.

In sum, the classical view reflected a broad tolerance for intervention, one in keeping with the ruling ideology of balance of power and the realities of the hierarchical distribution of power in the international system of the period. This conclusion is expressed concisely in Sir Robert Jennings and Sir Arthur Watts's magisterial account of the traditional customary law as a ban only on "dictatorial interference"²⁸ that might thereby upset the balance of power.

The next section will argue that the classical doctrine served nonetheless as the springboard for a more precise and restrictive doctrine of nonintervention upon the restoration of supranational governance.

B. *Lex Specialis Under the Charter*

The Charter regime can be understood only in the context of the League of Nations' failed effort to constrain intervention. The concept "domestic jurisdiction" emerged from the ashes of the First World War as a surrogate for the nonintervention principle. Article 15(8) of the Covenant of the League of Nations provided that:

If a dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.²⁹

While this provision left the domestic jurisdiction of states undefined, it did purport to require a quasi-judicial decision by the League—that is, the Council was to find that by

gentium or the Grotian conception. See Harold J. Berman, *The Role of International Law in the Twenty-First Century: World Law*, 18 *FORDHAM INT'L L.J.* 1617 (1995); see also Mark Janis, *Jeremy Bentham and the Fashioning of International Law*, 78 *AM. J. INT'L L.* 405 (1984); and Jeremy Bentham, *Introduction to Principles of Morals and Legislation*, in *THE UTILITARIANS* 286, 384 (1973) (reformulating *le droit des gens* as *le droit entre les gens*; the "law of peoples" into the "law between peoples," meaning the law regulating the interactions between states). Utilitarianism in this context tended to reinforce existing power relationships because it was the utilities of states, not persons, that was maximized.

27. See VINCENT, *supra* note 17, at 45–47, 98. Similarly, John Stuart Mill, who appeared to see his principle of nonintervention as having a moral dimension, employed a rule of utilitarian methodology to construct a categorical exception for counter-intervention and for cases "required by the higher principle of self-defense." See *id.* at 55–56, & 55 n.45 (discussing J.S. Mill, *A Few Words on Non-Intervention*, reprinted from *FRASER'S MAGAZINE*, Dec. 1859, in JOHN STUART MILL, 4 *DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL* 153–78 (1875)).

28. 1 L. OPPENHEIM'S *INTERNATIONAL LAW* 430 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter 1 OPPENHEIM]. Jennings and Watts add:

Although states often use the term "intervention" loosely to cover such matters as criticism of another state's conduct, in international law it has a stricter meaning, according to which intervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or sequences on that other state.

Id.

29. League of Nations Covenant art. 18, para. 5.

international law the matter was solely within a state's domestic jurisdiction—before it was divested of its powers under Article 15 relating to the peaceful settlement of disputes.³⁰

No substantive definition was supplied by the Permanent Court of International Justice in the *Case of the Nationality Decrees in Tunis and Morocco*, where the Court proclaimed: "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations."³¹ This opinion, the *locus classicus* of the view that there is no irreducible limit to the sovereignty of states,³² in effect conceals more than it reveals about how much is left in the vessel of sovereignty at any given time. Accordingly, at the San Francisco Conference in 1945, which drafted the U.N. Charter, the focus of the debate concerning nonintervention was on answering precisely this question.³³

The Charter's negotiating history reveals a remarkable strengthening of the noninterference norm. Most important, the change from the League of Nations formulation suggests an intent among the participants at San Francisco to expand the range of subjects to which the principle would apply. First, by moving the relevant text to the section on "Purposes and Principles" of the Organization,³⁴ the drafters expanded the domain of the nonintervention rule to include not only the Security Council but also all other organs of the United Nations.³⁵ Second, the principle was triggered where a matter was merely "essentially" within a state's domestic jurisdiction rather than, as under the League formulation, "solely" within a state's domestic jurisdiction.³⁶

On the other hand, the League Assembly's power to make the finding required under Article 15(8) may have been undercut by the Charter's silence on the point of interpretation.³⁷ One might argue that this silence as to the identity of the authoritative interpreter of the scope of the domestic jurisdiction of states underscored the *Nationality Decrees Case's* view of the essential indeterminacy of the noninterference principle. Under this view, the Charter's negotiating history in large part leaves the question better left answered through authoritative interpretation by the organs of the United Nations, subject to the criterion of general acceptance.³⁸

30. See M.S. RAJAN, *THE EXPANDING JURISDICTION OF THE UNITED NATIONS* 4 (1982) [hereinafter RAJAN, *EXPANDING JURISDICTION*]; and M.S. RAJAN, *UNITED NATIONS AND DOMESTIC JURISDICTION* 23 (2d ed. 1961) [hereinafter RAJAN, *DOMESTIC JURISDICTION*].

31. *Nationality Decrees in Tunis and Morocco*, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb 7).

32. See, e.g., RAJAN, *EXPANDING JURISDICTION*, *supra* note 30, at 3 (asserting the "general agreement among jurists and others that there were/are no matters which by their very *nature* were/are within the domestic jurisdiction of states").

33. See D.R. Gilmour, *The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter—An Historical Perspective*, 16 INT'L & COMP. L.Q. 330 (1967).

34. U.N. CHARTER art. 1. The concept was stated as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but the principle shall not prejudice the application of enforcement measures under Chapter VII.

Id. art. 2, para. 7.

35. See RAJAN, *EXPANDING JURISDICTION*, *supra* note 30, at 6.

36. See *id.*

37. See *id.* at 7.

38. John Foster Dulles, speaking for the powers who drafted what became the basis for the Charter, told the delegates to the San Francisco Conference that: "[F]uture generations will thank us for what we do in adopting simple phrases and allowing them to evolve as the state of the world, and the factual interdependence of the world, makes it necessary and appropriate that it should evolve." *Id.* (citing 10 U.N.C.I.O. Docs. 271–73 (1945)). M.S. Rajan relied on this statement to argue that the Charter "did not specify (again like the League provision) according to what criterion the decision on jurisdiction needs to be taken by whoever was to take it."

Yet, in the context of the Covenant's assignment to the League Council of the competence to determine the scope of the domestic jurisdiction or *domain reserve* of states, the diffusion of competence in the U.N. Charter suggests the Charter's framers believed the scope of domestic jurisdiction would best be determined by the resolution of disputes according to principled debate rather than merely the reflection of existing distributions of power. There would be a special role for dispute resolution, since the negotiating history suggests the Charter attached special weight to the views of the International Court of Justice (ICJ).³⁹ Indeed, the general report of the technical committee might even suggest that an opinion of the ICJ itself, as distinguished from the views of an ad hoc committee of jurists, would be authoritative even if not "generally accepted."⁴⁰ Thus, the merely quasi-judicial political process of interpretation seemingly embodied in the League Covenant formulation yielded under the Charter to a potentially juridical solution.⁴¹

See RAJAN, EXPANDING JURISDICTION, *supra* note 30, at 7; see also LOUIS B. SOHN, RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA 4-7 (1994). Sohn argues, without relying specifically on Dulles's statement at the San Francisco conference, that a process of authoritative interpretation of the broad and general provisions of the Charter could legitimately be undertaken by each organ subject to the condition of general acceptance in a way that permits the realization of the human rights principles embedded in the Charter. *Id.* Sohn relies in particular on report of Committee IV/2, which stated, in pertinent part:

In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. . . .

Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter. . . .

It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not *generally acceptable* it will be without binding force.

Id. at 5-6 (quoting 13 U.N.C.I.O. Docs. 709-710) (emphasis added).

Some, however, have suggested that the elusive and chimerical qualities of the Charter undermine any hopes of "authoritative interpretation," potentially undermining its credibility. See LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 15-16 (3d rev. ed. 1969) (describing the situation as one "in which the responsibility for interpreting the Charter and adapting it to specified situations is shared widely and with very limited possibility of an authoritative interpretation"; and noting that, "[c]onsidering that the perceived interests of members change and that the voting alignments of members vary according to the issues presented, this politicization of the interpretation process inevitably produces inconsistencies and confusion in the way the Charter is interpreted and applied").

39. See 13 U.N.C.I.O. Docs. 709:

If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an ad hoc committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference. In brief, the Members or the organs of the Organization might have recourse to various expedients in order to obtain an appropriate interpretation.

Id. at 709-10

40. See *id.* at 710 ("It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force."). Notably, this formulation does not limit the authoritativeness of a judgment of the ICJ by the "general acceptance" criterion unless it too is considered an "organ of the organization" in the same sense as the U.N.'s political organs. But see Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, HARV. INT'L L.J., Winter 1993, at 1, 40-43 (arguing against a theory of review by the Court of decisions by the Security Council under which the Court's decisions would not themselves be subject to the general acceptance criterion).

41. A juridical resolution to the question of domestic jurisdiction was, in fact, sought in the case of South Africa's claims with respect to Namibia. S.C. Res. 284, U.N. SCOR, 25th Yr., Res. & Dec., at 4, U.N. Doc.

The negotiating history further reveals that the Charter's conception of noninterference embodied more than a vague prohibition of "dictatorial interference." At the outset it should be observed that Article 2(7) unambiguously exempts from the nonintervention principle enforcement measures under Chapter VII.⁴² However, Chapter VII also authorizes the Security Council to make recommendations (which, setting aside whether they constitute "decisions" under Article 25 of the Charter,⁴³ are clearly not "enforcement measures" under Chapter VII). Articles 39 and 40 clearly distinguish between the "making of recommendations" and "deciding upon measures" as separate juridical categories. "Measures" under Articles 41 (relating to "measures not involving the use of armed force") and 42 ("measures involving the use of armed force") are the "enforcement measures" contemplated under Article 2(7). Accordingly, the "recommendations" made by the Council pursuant to Articles 39 and 40 would not benefit, under a close textual analysis, from the safe harbor from the nonintervention principle available for enforcement measures.⁴⁴ Thus, the rule against intervention in the *domain reserve* is inextricably bound to the system for collective security established in Chapter VII. This is not at all surprising given the important role that treatment of national minorities, the quintessential subject of domestic jurisdiction,⁴⁵ played in the inter-war period as the pretext for aggression in Europe.⁴⁶

It is in this context that the role played by the Australian delegation at the San Francisco conference, in strengthening the nonintervention rule of the Charter, acquires special significance. Australia's Dr. Evatt objected to an earlier formulation of the exception to the noninterference principle which would have encompassed not only enforcement measures but also recommendations by the Security Council under what later became Chapter VII.⁴⁷ The Australian Delegation then submitted as an alternative what, as amended to reflect the final organization of the text, became the current formulation; the

S/INF/25 (1970). Resolution 284 "request[ed] an advisory opinion from the International Court of Justice" on the question [w]hat are the legal consequences for States of the continued presence of South Africa in Namibia [South West Africa], notwithstanding Security Council resolution 276 (1970)." *Id.* pmb. para. 4, ¶ 1. This request generated the ICJ's Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (1970) [hereinafter Continued Presence of South Africa in Namibia]. The Council resolutions, and the ICJ's Advisory Opinion, played a key role in generating international support for Namibia's independence, including the development of a Security Council plan whose implementation was a major turning point in the end of the Cold War. See BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 341-88 (2d ed. 1990).

42. See U.N. CHARTER art. 2, para. 7.

43. See U.N. CHARTER art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

44. But see Gilmour, *supra* note 33. Gilmour posits that "[t]he wording of Article 2(7) was also intended to exclude all the functions of the Security Council under Chapter VI with reference to domestic matters and in addition the making of any recommendations with reference to such matters under Chapter VII." *Id.* at 346. However, "[t]his latter restriction is not usually insisted upon today. It is now generally accepted that if a matter is considered under Chapter VII of the Charter it has ceased to be domestic." *Id.* at 346 n.44; see also SOHN, *supra* note 38, at 87-89, 106-07, 118, 177 (suggesting a similar approach, but presenting the conclusion on the basis of substantial review of state practice rather than as an *ipse dixit*).

45. See 1 OPPENHEIM, *supra* note 28, at 973-75; see generally Nathaniel Berman, "But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law, 106 HARV. L. REV. 1792 (1993) (detailing transformation of the subject of minority rights into a subject of international concern during the inter-war period in a few generative, if anomalous, cases; namely, the status of the Saar, Danzig, and Upper Silesia).

46. See, e.g., TELFORD TAYLOR, MUNICH: THE PRICE OF PEACE 397-410 (1979) (former Nuremberg prosecutor and later law professor recounts the role of Sudetenland Germans under influence from Berlin in agitating for secession from Czechoslovakia and unification with Germany).

47. See Gilmour, *supra* note 33, at 346 (citing Amendment by the Australian Delegation to proposed ¶ 8 of Chapter II (Principles), Doc. 969, I/1/39, 6 U.N.C.I.O. Docs. 436-40 [hereinafter Document 969]).

draft limited the scope of the exception to enforcement measures.⁴⁸ From the consideration and acceptance of this proposal it almost certainly follows that the negotiators thought the noninterference principle under the Charter would be applicable in the case of recommendations. This inference undercuts the view that the duty of noninterference (as traditionally understood in the Oppenheim formulation, that is, “dictatorial interference”) was the meaning intended in the negotiations to draft the Charter.⁴⁹ Otherwise, the Australian proposal would hardly have been necessary to protect the domestic jurisdiction of states. No one seems to have questioned the premise of the Australian proposal.⁵⁰ Thus, that a stronger form of the noninterference principle was established in Article 2(7) as a *lex specialis* of nonintervention seems to follow clearly from the Charter’s negotiating history.⁵¹

The negotiating history relating to nonintervention also revealed a particular conception of the Security Council’s role in assuring collective security. Dr. Evatt’s statement of the reasons for the Australian proposal focused on the possibility that the Charter might otherwise “authorise the Security Council, in cases where a state is threatened or attacked by reason of some matter of domestic jurisdiction, to intervene in that matter by making recommendations to the state threatened or attacked.”⁵² The driving engine for the Australian proposal was, of course, the absence of a veto for members other than the Permanent Five.⁵³ The Australians noted that:

48. Gilmour, *supra* note 33, at 347–48. See also *id.* at 348 nn.47–49 (citing the legislative history of the Committee debating the Australian amendment).

49. In their discussion of collective intervention under U.N. authorization, Jennings and Watts—while recognizing that the noninterference principle stated in Article 2(7) “does not prejudice the application of enforcement measures under Chapter VII of the Charter”—appear to suggest that the concept of “dictatorial interference” serves, even without reference to Article 2(7), as a legal constraint on Chapter VII action. I OPPENHEIM, *supra* note 28, at 449. They observe: “Although Article 2(7) of the Charter provides that it does not authorise the United Nations to intervene with regard to matters which are essentially within the domestic jurisdiction of states, that provision does not exclude action, *short of dictatorial interference*, undertaken with a view to implementing the purposes of the Charter.” *Id.* at 448–49 (emphasis added) (citations omitted). It is not clear whether they ground this view on an interpretation of the Charter’s “purposes and principles” to include the ban on “dictatorial interference” or whether they would consider the ban a *jus cogens* norm that would trump the Charter. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 348 [hereinafter Vienna Convention]. But their view does lend support to the argument that Article 2(7) meant something more than “dictatorial interference.”

50. See Gilmour, *supra* note 33, at 348. One author goes so far as to state:

[I]t was the evident intention of those who drafted Article 2(7) of the Charter that the United Nations should observe a strict policy of non-interference in matters traditionally regarded as within the domestic jurisdiction of states, such as a state’s form of government, the treatment of its own subjects, which covers the entire field of human rights: in the absence of international treaties, its economic policies and questions of immigration and nationality: the size of its national armaments and armed forces: internal conflicts within its territory: and its administration of non-self-governing territories, if any, not placed under the trusteeship system of the United Nations.

GORONWY J. JONES, THE UNITED NATIONS AND THE DOMESTIC JURISDICTION OF STATES: INTERPRETATIONS AND APPLICATIONS OF THE NON-INTERVENTION PRINCIPLE 31 (1979) (citations omitted).

51. “[I]f it [is] established that the parties intended a term to have a special meaning it shall be given that meaning.” I OPPENHEIM, *supra* note 28, at 1272. See *id.* at 1272 n.10 (pointing to acceptance of the doctrine of “special meaning” in Article 31(4) of the Vienna Convention and the Advisory Opinion on the Western Sahara, 1975 I.C.J. 12, 53 (Oct. 16), as an exception to the normal rule of construction in accordance with ordinary meaning of the text).

52. Gilmour, *supra* note 33, at 347 (quoting from Document 969, *supra* note 47, ¶ 7).

53. See Document 969, *supra* note 47, ¶ 7 (“I assert that the sponsoring governments would not themselves have included in the Charter this principle of general intervention, had it not been for one significant fact. The Charter reserves to each of them an individual veto on action by the Council [under Chapter VII]. They can therefore assure their legislatures that these drastic powers of intervention in domestic matters can never be put into operation against themselves.”); but see JONES, *supra* note 50, at 31–32 (arguing that the negotiating history

[s]uch a provision is almost an invitation to use or threaten force, in any dispute arising out of a matter of domestic jurisdiction, in the hope of inducing the Security Council to extort concessions from the state that is threatened. Broadly, the exception cancels out the rule, whenever an aggressor threatens to use force. The freedom of action which international law has always recognized in matters of domestic jurisdiction becomes subject in effect to the full jurisdiction of the Security Council.⁵⁴

Arguably, acceptance of the Australian proposal signalled a commitment to avoid the kind of bootstrapping otherwise possible under the proposed text: that is, a state's making the internal affairs of another state the subject of international concern simply by unilaterally asserting a claim that the right of self-determination was being denied. It must be recalled that such unilateral claims served as the pretext for the aggressions that lead to the Second World War.⁵⁵ Thus, the collective security functions of the Council could not be premised solely on claims with respect to a matter within a state's *domaine reserve*.

C. *The Immediate Fate of the Lex Specialis: The Subsequent Practice*

One measure of the strength of the *lex specialis* is the significant role it appeared to play for many years in limiting the effect of the provisions of the Charter relating to international human rights law.⁵⁶

In synthesizing domestic jurisdiction and human rights, on the other hand, it seems clear from early subsequent practice that the organs of the United Nations did not view the legislative history on nonintervention as an impermeable barrier to the progressive growth of human rights in accordance with the provisions of the Charter.⁵⁷ For example, a case might be made that the early practice of the U.N. treated even the form of government of a state as a matter of international concern, given the U.N.'s refusal to admit Spain initially.⁵⁸ However, the better view is that the United Nation's early rejection of Spain, because it was governed by the Franco regime, establishes the exact opposite. The suggestion that it might serve as a precedent for pro-democratic intervention ignores the special role of the elimination of Fascism following the Second World War.⁵⁹

supports the view that: "those who drafted Article 2(7) of the Charter considered that the Security Council should possess the competence to authorise enforcement measures to maintain or restore international peace and security if the situation arising out of a matter essentially within the domestic jurisdiction of a state constituted a threat to the peace, breach of the peace, or act of aggression").

54. See Gilmour, *supra* note 33, at 347; see also JONES, *supra* note 50, at 24 (both quoting from Document 969, *supra* note 47, ¶ 10).

55. See Berman, *supra* note 45, at 1899; TAYLOR, *supra* note 46.

56. See SOHN, *supra* note 38, at 39–61, 76–78, 86–87, 138–39 (discussing the evolutionary expansion of Articles 1(3), 55 and 56, notwithstanding Article 2(7)).

57. See *id.* at 44–61 (citing the cases of recognition of the Franco regime in Spain, treatment of people of Indian origin in South Africa, and emigration of Russian wives of members of Allied forces).

58. For Sohn, the Assembly's recommendation of sanctions and the Council and Assembly's refusal to admit Francoist Spain into the United Nations serves as early subsequent practice yielding a precedent for U.N. action against a state simply because of the form of its government. *Id.* at 44–48. See also LORD MCNAIR, *THE LAW OF TREATIES* 431 (1961) (highlighting the significance of "contemporaneous practical interpretation").

59. For JONES, *supra* note 50, the best explanation of this subsequent practice is that:

[I]t was agreed at the San Francisco conference in 1945 that Spain could not be admitted to membership of the United Nations on the ground that the Franco regime had been installed with the help of the Axis Powers . . . Spain was accepted as a member of the United Nations in 1955 when the Franco regime was still in power.

Id. at 31 n. 47.

Similarly, the somewhat later practice that has been relied upon to argue for a narrow view of the noninterference principle, in fact, tends to support the broad view adopted in the Charter. The two principal instances of Chapter VII action by the Security Council in cases related to domestic violations of human rights, Southern Rhodesia (Zimbabwe) and South Africa, stand for very different propositions. In Southern Rhodesia, the special responsibilities of the U.N. concerning decolonization were implicated.⁶⁰ The same can be said for the South Africa case in relation to Namibia, but the more important point is that the Security Council action came only after the internal situations had begun to stimulate transboundary violence.⁶¹ In that case, it was not the reaction of intervening powers to internal developments that created the "threat to the peace," but rather the spillover across international borders of violence emanating from within the target state that made Security Council action legitimate.

On balance, early subsequent practice seems to support the *lex specialis* barring expansive use of the Council's powers. Before turning to a description of the constitutional mode of analysis for the U.N. Charter, it will be necessary to demonstrate that the recent change in the meaning of the Charter's collective security provisions is so deep that it could not be sustained even by the most expansive use of the conventional tools of treaty interpretation relying on these early, potentially ambiguous, cases.

III. COLLECTIVE INTERVENTION—THE DEMISE OF ARTICLE 2(7)?

The received interpretation of the Security Council's authority to take steps to enforce international peace and security was grounded mainly on the Australian concerns over the potential for erosion of state autonomy. Accordingly, it is argued that the Charter should be seen primarily as a collective security treaty rather than an integration of sovereignty in this area.⁶² But if internal matters could, in and of themselves, generate threats to the peace

The case serves, rather, as subsequent practice of the provisions of the Charter that function as a treaty of peace or settlement—much as the enemy states clauses are not now seen as organic parts of the Charter but as its vestigial organs. Under this latter view, the settled meaning of the Charter, including subsequent practice as persuasive as that occurring immediately after its adoption, would not permit enforcement action by the Council or its delegates to establish or restore democracy. Compare *infra* text accompanying notes 383–405 (discussing U.N.-authorized intervention in Haiti).

60. In the case of Southern Rhodesia, it might be argued the white Rhodesian government had established its status as a belligerent, and thereby entitled to the neutrality of the international community under a classical conception of the law of war. See 1 OPPENHEIM, *supra* note 28, at 165 ("[T]hird states have the rights and obligations of neutrality" upon "recognition of belligerency."). But this view is complicated by the doubtful status of law of neutrality in relation to Chapter VII, see Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976) (noting the law of civil war's de facto survival because of the Charter's failure to establish an effective system dealing with civil strife and the involvement of the Great Powers). Also relevant are the unique and special responsibilities of the United Nations, and Great Britain in particular, to ensure decolonization of Rhodesia in accordance with the by then well-established right of self-determination by the indigenous majority. See *Declaration on the Granting of Independence to Colonial Countries and People*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (1960); see *infra* text accompanying notes 298–301, for further discussion of significance of the Rhodesia precedent.

61. The South Africa case may well fit just as easily into the classical model of collective security envisioned by the Charter drafters. As the Security Council made clear in ultimately imposing an arms embargo, South Africa's "persistent acts of aggression against the neighbouring States" clearly yielded a situation unlike the one contemplated by the Charter's negotiating history, where nearby states objected to South Africa's internal order and by their own aggression created a situation where South Africa's internal order was made a subject of international concern. See S.C. Res. 418, U.N. SCOR, 32d Yr., Res. & Dec., at 5, pmbl. para. 2, U.N. Doc. S/INF/33 (1977).

62. See Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, TRANSNAT'L L. & CONTEMP. PROBS., at 377, 381–85 [hereinafter Slaughter, *The Liberal Agenda for Peace*] (describing the traditional view of the Charter as merely an alliance); see also Sean D.

within the meaning of Chapter VII (thus authorizing enforcement measures that by operation of Article 2(7) were uncabined by the nonintervention principle), then the Charter will have become something more than a collective security organization. From a legal standpoint, the Australian amendment will have been overturned. Since this change is at the core of the Charter's meaning, only "Humpty Dumpty"⁶³ could consider it anything less than an amendment to the Charter.

A. *The Revised Charter—Collective Pro-Humanitarian and Pro-Democratic Intervention*

The Clinton administration has recently articulated criteria for the use of U.S. force as part of United Nations "peace operations,"⁶⁴ a construct intended to encompass not only the traditional peacekeeping operations approved by the Security Council during the Cold War but also the new "peacemaking," or collective enforcement operations, recently conducted under Charter auspices pursuant to the Secretary-General's concept of operation in the *Agenda for Peace*.⁶⁵ The criteria employed by the administration correspond to the legal categories where developments previously thought to be within the domestic jurisdiction of states, under recent Security Council practice, appear to have warranted a finding of a "threat to the peace" under Chapter VII. In addition to the classical category of aggression, other categories warranting such a finding are: (1) "[u]rgent humanitarian disaster coupled with violence"; (2) "[s]udden interruption of established democracy"; and (3) "gross violation of human rights coupled with violence, or threat of violence."⁶⁶ The categories seem drawn from specific cases, such as: the Kurdish situation in northern Iraq or the situation in Somalia for the first category; Haiti for the second category; and Rwanda for the third category.⁶⁷ The overarching geopolitical strategy, known as "democratic enlargement," articulated by the President's National Security Adviser Anthony Lake, focuses on democracy both in international and internal governance. It claims that the national interest requires that:

democracy be at once the foundation and the purpose of the international structures [the United States builds] through this constructive diplomacy: the foundation, because the institutions will be a reflection of their shared values and

Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 222-23 (1994) (claiming that so-called "major power functions" legitimately flow from the collective security conception of the Charter).

63. "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" LEWIS CARROLL, *Through the Looking Glass*, in ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 151, 246 (John C. Winston Co. 1923).

64. Administration Policy on Reforming Multilateral Peace Operations, 33 I.L.M. 705 (1994) [hereinafter Peace Operations Policy Statement].

65. See AGENDA FOR PEACE, *supra* note 15, ¶¶ 34-37, 60-65.

66. See Peace Operations Policy Statement, *supra* note 64, at 803.

67. See also Anthony Lake, From Containment to Enlargement, Address at Johns Hopkins University, School of Advanced International Studies, 4 DEP'T ST. DISPATCH 658 (1993). Lake describes the strategy of enlargement as including four features: (1) reinforce the community of major market democracies, (2) nurture and consolidate new democracies and market economies, (3) counter aggression by states hostile to democracy and markets, and support their liberation when possible, and (4) pursue a humanitarian agenda by encouraging democracy and market economies in regions of humanitarian concern. *Id.* at 659-63. The strategy of enlargement is, in sum, a recipe for a general policy of pro-democratic intervention and, in regions of humanitarian concern, pro-humanitarian intervention. But see RICHARD N. HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD 17-18 (1994) (critiquing the categories as "shaped in part by recent or ongoing conflicts and political contexts in which policy makers sought to justify policies of intervention or non-intervention").

norms; the purpose, because if [the United States'] economic institutions are secure, democracy will flourish.⁶⁸

Though it certainly can still be said that the norm against unilateral forcible intervention has not been undermined in the post-Cold War world,⁶⁹ the right of collective

68. WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT 2 (Feb. 1995).

Thus, *Engagement and Enlargement* sets forth as an objective the establishment of "[a] framework of democratic enlargement that increases our security by protecting, consolidating and enlarging the community of free market democracies." *Id.* at 7. Much of this geopolitics is driven by an as yet unverified theory that, because democratic states are not inclined to go to war, the enlargement of the area of democracy by democratization, perhaps even the forced democratization, of currently undemocratic states, is likely to lead to a so-called liberal peace. For a useful exchange on this issue, compare Christopher Lane, *Kant or Cant: The Myth of the Democratic Peace*, 19 INT'L SECURITY, Fall 1994, at 5, 7-10, 45-49 (arguing that a pro-interventionist foreign policy by the United States would lead to more war rather than peace) and David E. Spiro, *The Insignificance of the Liberal Peace*, *id.* at 50, 51-52 (challenging the statistical significance of the empirical support offered for the Democratic Peace hypothesis) with Bruce Russett, *Correspondence: And Yet It Moves*, INT'L SECURITY, Spring 1995, at 164 (Russett, the high priest of Democratic Peace theory, responds to these criticisms). For an argument that, even if the premise that democratic states are peaceful is right, it may be that internal processes of transformation to democracy makes a state more, not less, aggressive during the transitional period, see Edward D. Mansfield & Jack Snyder, *Democratization and War*, FOREIGN AFF., May/June 1995, at 79.

69. On the other hand, there is a delicate relationship between process and substance in the legitimation of legal rules. See generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) [hereinafter FRANCK, THE POWER OF LEGITIMACY]. Thus far, collective intervention under Security Council authorization has been justified, as Clinton's Peace Operations Policy Statement suggests, on substantive grounds in addition to the appeal to procedural regularity drawn from Security Council authorization. See Peace Operations Policy Statement, *supra* note 64, at 802. Indeed, in the seminal case of the Iraq-Kuwait war, the Bush Administration sought explicit international approval under Chapter VII, S.C. Res. 678, *supra* note 3—even though it arguably already had a legal basis to act pursuant to Article 51 of the Charter and the request of the legitimate government of Kuwait—before, and perhaps in order to generate domestic support for, Congressional approval for action. See Authorization For Use Of Military Force Against Iraq Resolution, H.R.J. Res. 77, 102d Cong., 1st Sess., 105 Stat. 3 (1991).

The connection between unilateral and collective action may be greater than one might initially expect. It may be argued that unlawful unilateral intervention by the U.S. Executive Branch to support democracy played a role in legitimating collective intervention for that purpose. For example, in its explanation for its use of force in Panama in December 1989, the Bush Administration relied in part on the fact that U.S. deployment was "welcomed by the democratically elected government of Panama." COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT ON THE DEVELOPMENT CONCERNING THE DEPLOYMENT OF UNITED STATES FORCES TO PANAMA ON DECEMBER 20, 1989, H.R. DOC. NO. 127, 101st Cong., 2d Sess. (1990), reprinted in LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 924-25 (3d ed. 1993). The United States Congress too may have played a critical role in supporting the Executive Branch's efforts to justify international action on the basis of demand for democracy. Section 513 (now section 508) of each act since fiscal year 1986 appropriating funds for foreign assistance, has barred U.S. assistance whenever a "duly elected Head of Government is deposed by military coup or decree." Appropriations Act of 1985, Pub. L. No. 99-190, § 513, 99 Stat. 1185, 1305 (1985) (current version at Foreign Operations Appropriations Act, Pub. L. 103-306, § 508, 108 Stat. 1608, 1626 (1994)). While the denial of assistance by the United States in such cases has never constituted an internationally wrongful act, this congressionally-mandated policy nonetheless had normative significance.

Similarly, it may well be that individual humanitarian intervention to relieve famine is now less objectionable to the international community than it was before the Security Council authorized collective intervention in Somalia under United States leadership in December 1992. See S.C. Res. 794, U.N. SCOR, 47th Yr., Res. & Dec., at 63, U.N. Doc. S/INF/48 (1992). Even before the Cold War, the barrier may have been doubtful. See, e.g. Neil Henry, *Lifesaving Food Barge Stuck in Sudan Quagmire*, WASH. POST, Dec. 6, 1990, at A1 (reporting that Operation Lifeline Sudan relied on the approval of Khartoum and relief organizations were disinclined to provoke Khartoum); Keith Kendrick, *Khartoum Hampers Aid in Sudan, Officials Say; Support for Iraq slows Famine Donations*, WASH. POST, Oct. 6, 1990, at A22 (quoting State Department official claiming that cooperation of Sudanese government was needed for relief operation); *Sudanese Factions Agree to Allow Relief Agencies Into Famine Area*, N.Y. TIMES, Mar. 24, 1989, at A3 (reporting that rebels and government agreed to relief operations during informal cease-fire); Paul Lewis, *Western Lands Vow \$133 Million in Aid for*

intervention may well have crystallized in recent state practice, as recent scholarship focusing on the crucial distinction between collective and unilateral intervention seems to suggest.⁷⁰

B. *The Consistency of the Revised Understanding with the Original Charter Design*

The original Charter design—which some suggest “does not bear repeating”—envisioned “enforcement” action by the Security Council itself under forces that would be deployed under U.N. command and control pursuant to Article 43.⁷¹ Accordingly, in the United States Senate it was understood that before U.S. troops would be employed when the collective security provisions of Chapter VII were to be activated, the President would return to the Senate for its advice and consent to a new instrument.⁷² Because the recent practice of the Security Council has been to “authorize” the use of force by a state or group of Member States to address the putative threat to the peace, it has not been clear whether these actions constituted “enforcement” measures within the meaning of Article 42, an authorization by the Security Council of individual or collective self-defense under Article

Sudanese Relief, N.Y. TIMES, Apr. 12, 1989, at A13 (moving relief along avenues agreed to by government and rebels). One thus might question whether a pattern of reliance on certain substantive grounds for legitimation of collective intervention authorized by the Security Council, such as the restoration of democracy in Haiti (see *infra* notes 383–406, and accompanying text) will contribute to the establishment in the future of a norm supporting unilateral action to restore democracy even if the procedural justification of Security Council approval becomes unavailable. As every lawyer knows, the distinction between substance and process can sometime be evanescent.

70. See generally Lori F. Damrosch, *Changing Conceptions of Intervention in International Law*, in EMERGING NORMS OF JUSTIFIED INTERVENTION 91 (Laura W. Reed & Carl Kaysen eds., 1993) [hereinafter Damrosch, *Changing Conceptions*]. Damrosch states that: “[t]here is ample warrant for invoking the Security Council’s powers to respond to ‘threats to the peace,’ and in my view such a threat could be found even if the conflict had no overt transboundary elements. The salient difference is between *unilateral* and *collective* action.” *Id.* at 97. Damrosch argues that: “[a] ‘group of States’ acting within the framework of the UN would not be able to go beyond the strictures of Article 2(7),” *id.* at 96, which Damrosch understands only to relate to a bar against “dictatorial interference.” *Id.* at 95. Furthermore, the Security Council can benefit from the “explicit qualification in Article 2(7) concerning the Security Council’s coercive powers,” *id.* at 95, “and a group purporting to act under the auspices of a regional arrangement would likewise have no greater powers than the Security Council acting in its enforcement capacity, and would presumably need to obtain the Council’s authorization [pursuant to U.N. CHARTER art. 53, para. 1, which requires the Security Council’s authorization for an “enforcement action” by a regional security organization], which itself would be confined to what is consistent with Article 2(7).” *Id.* at 96 (citations omitted). See also Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT’L L. 1, 38 (1989) (“I wholeheartedly endorse the application of [the Article 2(4)] bar to use of force against the territorial integrity or political independence of a state] to attempts by any foreign power to change a state’s political system by force.”); Jochen A. Frowein, *Self-Determination As a Limit to Obligations Under International Law*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 16, at 211, 214 (asserting that unilateral intervention remains unlawful notwithstanding the legality of collective intervention).

71. See W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642, 643 (1984) [hereinafter Reisman, *Coercion and Self-Determination*]. For views that the history does bear repeating, compare HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 756 (George W. Keeton & Georg Schwarzenberger eds., 1964) (concluding that it was probably the intention of the “framers” that the Security Council was authorized “to take enforcement action involving the use of armed force only through the armed forces made available to it by special agreements concluded in conformity with Article 43”), with GOODRICH ET AL., *supra* note 38, at 314–26 (disagreeing, at 316–17, with the view expressed by the U.S. “[a]t an early stage in the Council’s history” that the Council would not be able to “fulfill its responsibilities as the enforcement agency of the United Nations” until Article 43 agreements had been concluded; noting that the U.N. could still act through voluntary forces, yet acknowledging that Article 42 has become “a dead letter”). See also James E. Rossman, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT’L L. & POL. 227 (1994) (arguing for a revived U.N. enforcement mechanism implementing Article 43).

72. See, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 205–06 (1990).

51, or yet some third source of inter-textual power of the Security Council.⁷³ It has been observed, however, that if collective intervention is authorized other than as an enforcement measure pursuant to Article 42, the exception under Article 2(7) for enforcement measures may not apply.⁷⁴ Indeed, the U.N. Under-Secretary-General for Legal Affairs has advanced the view that U.N. Resolution 678 authorizing use of force against Iraq to repel it from Kuwait was not "adopted under Article 42," and thus did "not provide for a collective enforcement action by the United Nations," but was instead simply "the exercise of power of the Council under Chapter VII."⁷⁵ The Secretary-General, a respected international law scholar, has subsequently taken a different view.⁷⁶

These are sound structural reasons to focus on this question. Because it was contemplated that enforcement measures under Article 42 would take a particular form, the exception for enforcement measures under Article 2(7) served important values. Mainly, since enforcement measures were intended to be undertaken under U.N. command and control, it was thought they would apply force in accordance with internationally agreed mandates rather than the purposes of individual states whose forces were employed.⁷⁷ Accordingly, the values consistent with the nonintervention principle are less effectively served by collective intervention under Security Council authorization than by intervention directly under internationalized command and control. Thus, the mere fact that intervention has been characterized as "collective," and thus bears some form of U.N. imprimatur, does not necessarily dispose of the textual problem raised by Article 2(7). If anything, to conform with the original Charter intent, collective intervention authorized by the Council would seem to need to appear even more impartial and neutral than what might have been possible through intervention by U.N. forces constituted under Article 43.⁷⁸ The technical doubts about whether the enforcement exception to Article 2(7) applies for enforcement action undertaken by Member States should be resolved in a way that reinforces the need for impartiality in the enforcement of community norms.

73. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459 (1991) (concluding that such authorizations may well be consistent with both Articles 42 and 51); see also Murphy, *supra* note 62, at 226 (noting that it is no doubt possible to argue that the specific provisions of Chapter VII do not exhaust the power of the Security Council under the Charter, since, as Article 24(2) suggests in enumerating the provisions identifying the "specific powers" of the Council, the Council may well have "general" powers as well to maintain international peace and security in accordance with the Charter's "Purposes and Principles").

74. See Murphy, *supra* note 62, at 227; accord, Watson, *supra* note 40, at 35 (doubting whether the Court would find much law to apply in Article 2(7) of the Charter and, given the enforcement action exception, discounting Article 2(7)'s relevance to most cases in which the Security Council's conduct might be judicially challenged).

75. Carl-August Fleischhauer, *Remarks on Compliance and Enforcement in the United Nations System*, 85 AM. SOC'Y INT'L L. PROC., 429, 431 (1991), quoted in Murphy, *supra* note 62, at 227 n.89.

76. See UNITED NATIONS, GENERAL ASSEMBLY, SUPPLEMENT TO AN AGENDA FOR PEACE: POSITION PAPER OF THE SECRETARY-GENERAL ON THE OCCASION OF THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS, ¶ 78, U.N. Doc. A/50/60 (1995) (characterizing the Council's authorization to use force in the Korean, Iraq-Kuwait, Somalia, Rwanda, and Haiti cases as "enforcement action") [hereinafter SUPPLEMENT TO AGENDA FOR PEACE].

77. Article 43 specifically contemplated the establishment of U.N. forces pursuant to agreement with Member States, which would turn over command and control to the U.N. See U.N. CHARTER art. 43, para. 1 ("All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."). These were the "air, sea, or land forces" Article 42 contemplated would be used by the United Nations to "maintain or restore international peace and security." *Id.* art. 42.

78. As Damrosch has observed in the context of unilateral humanitarian intervention: "[I]t is not possible to construct a persuasive argument to legitimize the use of force for humanitarian purposes while remaining within the idiom of classical international law." Damrosch, *Changing Conceptions*, *supra* note 70, at 96; see also Thomas Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 188-96 (Lori F. Damrosch & David J. Scheffer eds., 1991).

But this is only to say that collective intervention, if legitimate for the pro-democratic and pro-humanitarian reasons now formulated by the Clinton administration, can legitimately be conducted by Member States acting under the authority given to them by the Security Council outside of Article 43 only if it is conducted in a manner consistent with Article 43's larger purposes. It does not explain how the Clinton administration's new formulations have become lawful grounds for collective intervention. How then to account for the revision of the Charter to legitimate U.N.-authorized use of force under pro-democratic or pro-humanitarian rationales in the post-Cold War era?

C. *The Limits of Conventional Tools—A Treaty or Constitution?*

One might wish to frame an argument justifying the new grounds for intervention in terms of the Charter's subsequent practice. After all, how much work can text and negotiating history do to explain the Charter? In the first place, the negotiating history has been seen by many as indeterminate;⁷⁹ thus, opening the door to an interpretation focusing more on the subsequent practice of the parties rather than their original intent.⁸⁰ This kind of analysis of treaties seems even more justified today than it was in the early days of Charter interpretation before the Vienna Convention settled any doubts there may have been about the primacy of subsequent practice over negotiating history.⁸¹

In theoretical terms, too, a strong argument can be made for focusing more on subsequent practice under the Charter than would be permitted under other treaties, given the generality of the Charter's language and its unique role in creating a set of global institutions. Arguing from a treaty law conception of the Charter, one would employ a contractual model of treaty interpretation that gives appropriate weight to the fact that the Charter—rather than simply summarizing the post-World War II settlement—establishes an ongoing relationship between states. Under this so-called "dynamic" model of treaty interpretation,⁸² certain agreements are more properly analyzed under a complex synthesis

79. See, e.g., Gilmour, *supra* note 33, at 332–33 (describing the range of views).

80. See, e.g., SOHN, *supra* note 38, at 4–7 (discussing the drafters' agreement on the criterion of "general acceptance" as the measure of authoritative interpretation by U.N. organs). Sohn's approach should not, however, be confused with Jones' epistemological skepticism in his "loop-hole" theory of Charter interpretation. See JONES, *supra* note 50, at 32 (relying on the lack of a definition of the term "threat to the peace" to argue the ultimate indeterminacy of the exception to Article 2(7) and thus Article 2(7) itself); see also GOODRICH ET AL., *supra* note 38, at 64 (suggesting that "because [Article 2(7)] was not to be interpreted solely by legal standards, there was no reason for making the Court its sole, or even its principal, interpreter"); accord Watson, *supra* note 40, at 35 (citing the indeterminacy of Article 2(7) to argue that "there is little raw material" in the Charter to provide a basis for limiting the intervention of the international community in a state's domestic jurisdiction).

81. Compare Vienna Convention, *supra* note 49, art. 31, ¶ 3(b) (describing as a primary means of interpretation "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation") with *id.* art. 32 (treating negotiating history as a "supplementary means of interpretation" to which recourse may be had at any time to "confirm" a meaning derived from the primary means, but only when interpretation according to the primary means "leaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable.").

82. The model was first employed in a treaty analysis in a study of the U.S. response to an apparent arms control violation by the former Soviet Union. See Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1553–56 (1991) (discussing implementation of Treaty on the Elimination of Intermediate-Range and Shorter Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., 27 I.L.M. 84 (entered into force June 1, 1988)). Professor Smith analyzes the Soviet Union's failure to destroy a weapons system found in the German Democratic Republic (GDR) on the pretext that title had passed to the GDR before the Soviet Union had become obligated, and the United States' failure to take countermeasures, as an example of the greater predictive power of the "dynamic" model of treaty interpretation. *Id.* It might be observed that a more complex synthesis of the precedential value of this case under a traditional legal interpretation might also analyze the incident in terms of the political context of the imminent reunification of Germany in which it actually arose. Treaty on the Final Settlement with Respect to Germany, *supra* note 2. Clearly, German

of the "relational" model of modern contract analysis and international regime theory.⁸³ The "relational" model is drawn from recent U.S. contract law scholarship questioning the relevance of traditional rules of contract, particularly rules relating to interpretation and breach, which were formulated to serve the needs of discrete exchange transactions rather than to construct an ongoing relationship of cooperation based on reciprocity.⁸⁴

But, as even the dynamic interpretation's leading disciple in international law observes, "dynamic international commitments raise conceptual puzzles when traditional doctrines of international obligation are applied to them,"⁸⁵ and thus are of limited force in constructing a theory of interpretation of international obligations. This is because, among other things, "norms play different roles in the international and domestic arenas. In developed domestic legal systems, well-codified norms apply to individual actors."⁸⁶ By contrast, "identifying a set of norms applicable between states poses serious problems. Simply identifying a source of norms analogous to the moral strictures imposed upon individuals within a state is difficult."⁸⁷ It is hard to see how this difficulty can be resolved through modification of treaty law interpretive doctrine to rely, as dynamic interpretation does, on rational choice theory.⁸⁸ The moral dimension continues to be a vacuum under this approach.⁸⁹

succession to control over missiles "owned" by East Germany in the context of continued German membership in NATO was not a security threat to the West. *Id.* art. 6. From this standpoint, then, it seems unnecessary to employ a dynamic model of treaty interpretation to explain that, rather than that the Soviet conduct was not a breach or that it was not a breach that gave the U.S. the right to take responsive measures, the Allied powers might have simply waived the breach by the Former Soviet Union.

83. See Smith, *supra* note 82, at 1594. The term "dynamic" as used by Smith should not be confused with the distinction drawn by M.S. Rajan in RAJAN, DOMESTIC JURISDICTION, *supra* note 30, at 74-75, or between the Goodrich/Hambro/Simons "static" interpretation of the U.N. Charter in accordance with the literal and restrictive meaning of its provisions and Lauterpacht's "dynamic" approach in accordance with the broad general principles contained in the Charter to meet the changing needs of international society. See also Jones, *supra* note 50, at 30; but cf. Christopher J. Borgen, Note, *The Theory and Practice of Regional Organization Intervention in Civil Wars*, 26 N.Y.U. J. INT'L L. & POL. 797 (1994) (invoking a "constitutional model" to describe the same process). As noted earlier, Jones goes so far as to suggest that the original Charter intent was to leave a "loop-hole" under which each organ could reinterpret the meaning of Charter provision, such as Article 2(7). JONES, *supra* note 50, at 32.

84. Smith, *supra* note 82, at 1582-86 (relying in large part on IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980)). Thus, Professor Smith argues the flexible or dynamic interpretation may well characterize, in addition to arms control regimes, other international agreements in which "[s]tates must undertake cooperative endeavors in the face of uncertainty to preserve biological diversity, respond to global warming, limit ozone depletion, and control interstate distribution of hazardous materials," to name only a few examples. Smith, *supra*, at 1605.

85. Smith, *supra* note 82, at 1577.

86. *Id.* at 1590.

87. *Id.*

88. Professor Smith employs the theory of international regimes—more particularly, those aspects relating to the theory of games—to explain the role of reciprocity in international arms control regimes. Smith, *supra* note 82, at 1591-94. Rational choice theory can be employed, as Smith does here, to suggest preferred interpretive outcomes in a way functionally similar to the New Haven School's approach to treaty interpretation. See generally MYRES S. McDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967) (employing a teleological approach to interpretation, to maximize specified public values). The ICJ itself seems to have on at least more than one occasion adopted this kind of methodology, often implicitly and even sometimes explicitly. See, e.g., Advisory Opinion, Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Mar. 3), 23 (dissenting opinion of Judge Acevedo: "[O]ne must seek the methods of interpretation [of the Charter] most likely to serve the natural evolution of the needs of mankind."). Rational choice theories can be employed more persuasively, however, as policy rationales to construct or amend, rather than to interpret, legal regimes. See, e.g., Kenneth W. Abbott, "Trust But Verify": The Production of Information in Arms Control Treaties and Other International Agreements, 26 CORNELL INT'L L.J. 1 (1993).

89. The move from treaty to constitution must involve greater sensitivity to the moral dimension. Treaties seem to lack a moral dimension, given their ultimate foundation in principles of state sovereignty, as perhaps best

In addition, even if the “dynamic” theory did expand the possibilities for relying on subsequent practice to conform the treaty to the current needs of the parties, there would need to be some limits on its ability to do so, or the basic principle of *pacta sunt servanda* would disappear.⁹⁰ It thus would seem that neither approach could legitimately employ subsequent practice to revise a meaning derived from an analysis of text and context, and confirmed by a review of negotiating history.⁹¹ It is doubtful that a change in the Charter so vast as the nullification of the Australian amendment’s rejection of pro-democratic and pro-humanitarian intervention could be explained on this basis.

Nonetheless, attempts of this kind to move beyond the conventional paradigm help us in identifying a new direction of inquiry—not to a revision of the law of treaty interpretation, but rather the emergence of a new law of constitutional interpretation.⁹² Thus, the puzzles that may confound analysts of treaty change may serve as opportunities for analysts

exemplified in the doctrine of *rebus sic stantibus*. See Vienna Convention, *supra* note 49, art. 62. Accordingly, the Realist focus on the state may well do little harm in providing an adequate account of the source of obligation for most treaties. Different strands of the realist tradition highlight the ethical incoherence of reifying the state. See, e.g., REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 85 (1932) (“[I]t must be noted that nations do not have direct contract with other national communities with which they must form some kind of international community. They know the problems of other peoples only indirectly and at second hand. Since both sympathy and justice depend to a large degree upon the perception of need, which makes sympathy flow, and upon the understanding of competing interests, which must be resolved, it is obvious that human communities have greater difficulty than individuals in achieving ethical relationships.”); see generally *id.* 83–112 (ch. 4) (The Morality of Nations).

But the amorality of international life has infected not only realists but also philosophers drawing from idealist traditions. John Rawls, for example, assuming the equality of right of states, sees the doctrine of nonintervention as a corollary of the principle of self-determination, and finds a much lower standard of international morality than his methodology locates in domestic regimes. See JOHN RAWLS, A THEORY OF JUSTICE 378 (1971); John Rawls, Political Liberalism 12, 272 & n.9 (1993) (articulating his conception of liberalism on the basis of a “closed society” that does not include “justice between nations”); and John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES, 1993 (Stephen Shute & Susan Hurley, eds. 1993) (making explicit suggestion made in A THEORY OF JUSTICE that the principles of justice selected in the international sphere would not necessarily conform to those of domestic society, where the state of nature to the individual state would not be quite so threatening as the state of nature to individuals); see also H. Suganami, THE DOMESTIC ANALOGY AND WORLD ORDER: PROPOSALS 13 (1989).

Others have nonetheless sought to extend to the international sphere Rawls’ neo-Kantian, neo-contractarian methodology in accounting for the liberal welfare state, but others have criticized these efforts as founded on the error that states are legitimate units of moral analysis. See, e.g., CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 8 (1979); see also Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980) [hereinafter Walzer, *Moral Standing*] (not explicitly relying on Rawls but attributing moral status to states as proxies for communities); criticized in FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988) [hereinafter TESÓN, HUMANITARIAN INTERVENTION]. Arguably, the incoherence of interpretation based on the reification of the state as the unit of analysis is more pronounced as one approaches issues of a more fundamental character, such as those that arise in interpreting the U.N. Charter as a supranational constitution.

90. See Vienna Convention, *supra* note 49, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

91. See *id.* arts. 31, 32 (always permitting resort to negotiating history to confirm the meaning derived from the text and its context).

92. Arguably, the dynamic model could be considered a type of constitutional interpretation, in which constitutional interpretation is understood to permit institutions to fill in perceived gaps in meaning in the text through essentially legislative processes. See, e.g., Borgen, *supra* note 83, at 832 n.138 (arguing for a reinterpretation of Chapter VIII to fit current Security Council practice based on an evolutionary approach borrowed from a school of U.S. constitutional interpretation built around Justice Cardozo’s concurrence in *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934)); cf. Boutros Boutros-Ghali, *A Grottan Moment*, 18 FORDHAM INT’L L.J. 1609, 1614–15 (1995) (stating that “the obstacles to securing . . . a Charter amendment . . . may be too great . . . [However] the Founders of the United Nations deliberately framed the Charter in a flexible way, which, over the past half-century, has enabled the Organization to adapt to changing circumstances . . .”).

of constitutional change.⁹³ The puzzles in a self-described analysis of treaty interpretation would, by way of counter-example, point to the possibility of a new hermeneutic for instruments, such as the U.N. Charter, constituting a new order integrating sovereignty in a qualitatively new way.

IV. GROUNDWORK FOR A THEORY OF SUPRANATIONAL CONSTITUTIONALISM

Can the U.N. Charter now be understood as that "Once and Future" Constitution?⁹⁴ If so, constitutional interpretation would then be more appropriate in accounting for stability and change in Charter interpretation. In the case of international regimes more broadly constitutive in character, a focus on the state as the unit of analysis in international obligation would then be misplaced. In these "constitutive" cases, it would then be more useful to analogize international obligation and the interpretation of norms so constituted to the problem of constitutional obligation in the domestic sphere.

A. *The Institutional and Normative Foundations*

Why constitutional analysis? The term immediately conjures the image of a pre-existing political community bound together by a set of fundamental principles, perhaps under a supreme written instrument. A simple answer might be that the Charter by its own terms supersedes any other prior or subsequent treaty obligations.⁹⁵ But constitutional theory must go beyond this simple point of textual supremacy and engage in a discussion that links normative and institutional considerations. As Alec Stone has argued, "the establishment of metanorms is an institutionalization of the social interest."⁹⁶ The focus on

93. As Thomas Kuhn demonstrated long ago, anomalies within one conception may well become new paradigms. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

94. Former Foreign Minister Eduard Shevardnadze of the former Soviet Union, describing Iraq's invasion of Kuwait, as a threat to the "emerging new world order," noted "[w]e are again becoming the United Nations and we're returning to our own global constitution; the United Nations Charter." Address of Soviet Foreign Minister Eduard Shevardnadze to the United Nations General Assembly, Sept. 25, 1990, quoted in Smith, *supra* note 82, at 1550. But cf. Alvarez, *supra* note 5, at 6.

95. See U.N. CHARTER art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

96. See Alec Stone, *What Is a Supranational Constitution?: An Essay in International Relations Theory*, 56 REV. POL. 441, 444 (1994) ("[A] constitution denotes a body of metanorms . . ."). Stone defines "metanorms" as "rules that specify how legal norms are to be produced, applied, and interpreted." *Id.* Stone may well have in mind, although he does not make the connection explicit, H.L.A. Hart's concept of "rule of recognition," which Hart asserts "will specify some features or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts." See H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961). Hart further supposes that the notion of sovereignty can be reconceived as the existence of an "ultimate rule of recognition," that is, a rule of recognition that specifies the creation of lower-order rules of recognition. *Id.* at 102. The crucial distinction between the so-called ultimate rule of recognition and lower-order rules of recognition is that the latter can be said to be valid or invalid in terms of the ultimate rule of recognition but the ultimate rule of recognition can only be said to exist or not exist as a question of fact. *Id.* at 106-107. Hart's neo-positivist account of sovereignty yields for him the conclusion, when applied to the international context, that there is no ultimate rule of recognition in the international system. However, Hart recognizes the possibility of such a rule emerging from multilateral treaties which could bind non-parties if:

[S]uch treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules. A basic rule of recognition could then be formulated which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states.

institutions under this approach should not be confused with a search for a uniquely "sovereign" institution (in the Hobbesian sense that the monarchy might be the supreme repository of authority).⁹⁷ Following Stone's approach, it would be difficult to state precisely what body or bodies of the U.N. system perform institutionalizing functions. Some might point to the General Assembly.⁹⁸ Others might see the Security Council as more democratically legitimate, since its decisions, requiring concurrence in effect of a majority or near-majority of the world's economy and population, may well secure greater assent;⁹⁹ or perhaps there is a role for the Court.¹⁰⁰

The longstanding debate about the meaning of sovereignty has been reconceived more usefully by H.L.A. Hart as a search for an empirical assessment of the existence of acceptance of a supreme authority, which itself is better understood as a rule stating the means for determining whether social policies are authoritatively adopted.¹⁰¹ The virtue of this analysis is that one can, employing Hart's terminology, usefully distinguish between whether an ultimate rule of recognition exists in the international legal system and the analytically separate question of describing its terms. Awareness of the complexity of articulating such an ultimate rule within a legal system should not, however, undercut the conclusion that one exists. Hart's assertion that the ultimate rule of recognition in England that "what the Queen in Parliament enacts is law,"¹⁰² is now complicated by the supranationalizing effect of the European Community (EC).¹⁰³ Accordingly, articulating an

Id. at 231. Hart's insight about the possibility of the emergence of a basic rule of recognition, and thus in classical terms, a sovereign for the international system, invites consideration of the U.N. Charter as the kind of multilateral treaty that by itself or in conjunction with other multilateral treaties could serve as the basis for an ultimate rule of recognition. *But cf.* FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 69, at 185-95 (locating an international ultimate rule of recognition in the traditional doctrine of sources under which treaties, custom and general principles of law become binding); *see also* Jose E. Alvarez, *The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations* by Thomas M. Franck, 24 INT'L L. & POL. 199, 201-02, 249-51 (1991) (describing and critiquing Franck's account of HART, *supra*).

97. *See* THOMAS HOBBS, *LEVIATHAN* 129-38 (Richard Tuck ed., 1991).

98. *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 547 (1993) (conceiving important General Assembly resolutions as a form of international legislation by an international parliament); *see also* SOHN, *supra* note 38, at 63-149 (discussing the influence of the General Assembly in driving the Security Council to take binding decisions with respect to ending apartheid in South Africa).

99. *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 n.53 (1991) (describing the United Nations structure, permitting the Council to make binding decisions and the General Assembly only to make recommendations, and noting that "Permanent Members must be seen, at least partially, as representative of the major interests of the different political groupings in the General Assembly.").

For an argument that the legitimacy of the Security Council can be enhanced by amending the Charter or employing ad hoc mechanisms to create a new class of permanent members without veto and selecting the new permanent members based on these criteria, *see* Murphy, *supra* note 62, at 264-69.

100. *See generally* Watson, *supra* note 40 (arguing for a Jeffersonian theory of judicial review by the ICJ under which the Court would be neither final nor infallible).

101. *See* HART, *supra* note 96, at 215-21.

102. *See id.* at 104.

103. Even before recent constitutional developments transforming the European Community into the European Union, students of the European Community have considered it clear that the Community was a constitutional regime. *See, e.g.*, Weiler, *supra* note 99, at 2412-13; Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 210 (1990) ("At present, the constitutional character of the European Community Treaties stands beyond doubt.") [hereinafter *Lenaerts, Constitutionalism and Federalism*]; Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the of the European Community*, 34 AM. J. COMP. L. 229, 231 (1986) (noting that the "Constitution of the Community takes the form of a series of international treaties"); and Stein, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy*, 127 U. PA. L. REV. 897, 900-05 (1979).

With the Maastricht Treaty and the consolidation of the European Union, this conclusion seems beyond doubt; rather, the question has become whether and how this new legal order preserves the nation-state under a federal relationship. *See, e.g.*, Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J. 846, 893 (1994) (arguing that even the new post-Maastricht principle of subsidiarity is not an allocation of powers as between the Community

ultimate rule of recognition for the United Kingdom may well be a complex task, and even more daunting for any federal system.¹⁰⁴ Professor Ackerman's attempt to provide a historical account of unwritten amendments to the U.S. Constitution calls upon a complex political theory to prescribe what Hart would call an ultimate rule of recognition.¹⁰⁵ Thus, it is at least arguable that the ultimate "rule" of recognition for the U.S. is so complex that it defies formulation as a statement that any lawyer would normally consider to be a "rule." This argument does not mean that, under Hart's theory, there is no "ultimate rule of recognition" for law in the U.S.¹⁰⁶

One can then initially focus more generally on the institutional characteristics of supranational constitutionalism, without specifying all its constituent institutions, to describe the emergence of a constitutional realm. Stone thus argues,¹⁰⁷ drawing from a school of the modern international relations regime theory known as "modified structural realism,"¹⁰⁸ that the expression of norms through international institutions has "an expansionary logic" leading to constitutionalism.¹⁰⁹ International institutions are normally explained in neo-realist international relations theory as the result of efforts by the Great Powers to solve a security dilemma by institutionalizing patterns of cooperation and mechanisms that legitimate their exercise of power. Stone states that claims that modified structural neo-realism, as advanced by Robert O. Keohane,¹¹⁰ can move beyond this "hegemony" theory by explaining how, even after the passing of hegemony, institutions established through hegemony survive.¹¹¹ Such international institutions can acquire an independent existence (and, thus, the capacity to constrain unilateral conduct of states)¹¹² by establishing "legitimate standards of behavior."¹¹³ Stone's theory accordingly treats constitutionalism as a process of movement along a continuum of clarity and formalization of regime norms and the degree of institutionalization of the social interest.¹¹⁴

Under this concept of constitutionalism, focusing on the independent existence and perceived normative weight attached to lower-order norms,¹¹⁵ Stone is prepared to

and Member States, but rather a "political principle, a sort of rule of reason," guiding the exercise of powers by Community institutions) [hereinafter Lenaerts, *Subsidiarity and the Environment*]; George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 357-58 (1994).

104. Kent Greenawalt, applying Hart's methodology to an assessment of the ultimate rule of recognition in the United States, found that the text of the Constitution itself was not enough. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659-60 (1987) (applying Hart's methodology to the United States Constitution and finding that, although the "supreme criterion" for the ultimate rule of recognition can be located in Article V, the amending clause of the Constitution, the statement of the ultimate rule of recognition itself from the standpoint of a person within a state requires nine different hierarchically-arranged propositions beginning with the "text" of the Constitution and ending with "customs" within a particular state).

105. See *infra* text accompanying note 228.

106. In this context, however, the abstractness of an ultimate rule of recognition is not necessarily a critical failing so long as it does not undercut the process of giving subjects of law determinate notice of what is required of them, if possible through the clarifying effects of authoritative interpretation and subsequent practice. See FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 69, at 74-75 (distinguishing between Sophist norms, which entail such complexity that their determinacy is questionable in some situations, and Idiot norms, which are so protean that their determinacy is questionable absent subsequent authoritative interpretation).

107. See Stone, *supra* note 96, at 469-74.

108. *Id.* at 455-57.

109. *Id.* at 457.

110. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984); see generally Slaughter Burley, *supra* note 22.

111. Stone, *supra* note 96, at 456.

112. *Id.* at 446.

113. *Id.* at 456.

114. *Id.* at 471.

115. Cf. Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 725 (1988) (articulating legitimacy of institutionally-promulgated norms as a pull toward compliance with pronouncements

categorize the U.N. as a kind of constitutional regime in which: "codified metanorms govern how legal norms are produced, applied and interpreted. Institutionalization takes the form of concrete organizations formally autonomous from the parties to the regime. The function of these organizations is to represent the social interest."¹¹⁶ Defining the U.N. Charter as a constitution does not imply that the U.N. functions at the highest level of constitutionality under the continuum set forth in Stone's scheme. For example, he describes the European Union as a supranational constitution under which for the first time in world history, a regime in which "metanorms govern not only how legal norms are produced but constrain their content on both the supranational and national levels" has emerged out of international anarchy.¹¹⁷ Similarly, Keohane observes that "the principles and rules of international regimes will necessarily be weaker than in domestic society, [for] they drift around without being tied to the solid anchor of the state."¹¹⁸ That said, Stone's methodology suggests that it is meaningful to talk about an international constitution, or at least to consider translating some features of the analysis of constitutional change to the process of change of an supranational constitutional regime.¹¹⁹

Yet the legitimacy of the exercise of power is defended in principled terms, so that a supranational constitution also needs to be defended using normative language. The next section identifies the possible normative foundations for a supranational constitution by unraveling the justifications that might be offered for the use of force by Member States under the authority of the Security Council.

B. *Sources of Legitimacy for Supranational Constitutionalism*

Given the relationship set forth in the text of the U.N. Charter between Article 2(7) and Chapter VII, the constitutional character of the Charter is often debated in terms of

issued in accordance with "right process"); see also Murphy, *supra* note 62, at 249 & n.173 (relying on Franck's concept of legitimacy to justify recent Security Council decisions).

116. Stone, *supra* note 96, at 473.

117. *Id.* See also *infra* text accompanying notes 161-173, for a discussion about whether the United States experienced a similar transformation in the years after 1776.

Stone also appears to rank the U.N. on the same plane as other major international institutions, such as the GATT and the Vienna Convention on the Ozone Layer. *Id.* at 471 (illustrating a continuum of institutionalized cooperation without mentioning the formal relationship between the U.N. Charter and these other treaties under the U.N. Supremacy Clause).

118. KEOHANE, *supra* note 110, at 62, cited in Stone, *supra* note 96, at 457; see also John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5, Winter 1994/95, at 5, 7-12 (advancing the even stronger criticism that international institutions do not affect the behavior of states, particularly with respect to issues of war and peace). But see Michael Ignatieff, *Alone with the Secretary-General*, NEW YORKER, Aug. 1995, at 33, 36 (alluding to the radical change in the role of the U.N. since 1992 and observing that "wherever the Secretary-General goes, he commands assets on the ground which most heads of state would envy . . .").

119. Stone's focus on institutionalization rectifies a major defect of neo-realist thinking, which resists the possibility of change. In an insightful essay, John Ruggie pointed out that just as the principle linking constitutive units within the modern state system was private property, the principle linking the constitutive units of the international system was sovereignty. John G. Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, in NEOREALISM AND ITS CRITICS 131, 145 (Robert O. Keohane ed., 1986). Just as property did not need to be the organizing principle in the state, absolute sovereignty theoretically did not need to rule in international life. But the neorealist account did not provide an explanation of how change could come about. However, Ruggie finds an explanation for change in the concept "Durkheim calls dynamic density." *Id.* at 148. Under the concept of dynamic density, the interactions of the constituent units of the international system will have effects not only on the distribution of capabilities across the system but also on the basic structure of the system itself. Thus, according to Ruggie, "Durkheim's notion of dynamic density *can* be linked to a societal restructuring of property rights and political organization . . . [with] domestic and international consequences . . ." *Id.* at 149 (emphasis in the original). See *infra* note 183 (discussion of Durkheim's distinction between mechanical and organic solidarity in the context of the argument from community and its relation to the capacity to stimulate social change).

developing criteria for when the Security Council can make a determination required under Chapter VII that there is a “threat to the peace, a breach of the peace, or an act of aggression,” as a predicate for the use of force or other enforcement measures.¹²⁰ The sources of international violence have been located in defects in human nature, defects in the structure of states, and defects in the international system.¹²¹ But the legal standard of “threat to the peace” seems to call for an analysis that looks more to the proximate causes rather than to the general causes of an event.¹²² The legal perspective’s attention to proximate causes of “threats to the peace” has flowed from the traditional conception of the Charter as a collective security organization, under which the paradigm of legitimate use of force is self-defense, rather than as world government.¹²³

Justifications for intervention thus point to the cases where internal developments have immediate external effects causing international violence. Other than instances of direct or indirect aggression, these cases can be said to fit into two different categories. First, internal affairs could yield societal disruption, which might have spillover effects on third countries, such as mass migrations. Second, other states, while not affected by spillovers, could express a psychological concern for the ongoing developments in a state, either for reasons of principled altruism (perhaps a commitment to a minimum standard of treatment for ethnic minorities) or fear of potential effects (perhaps the precedential effect of dissolution of ethnically heterogeneous communities). Intervention based on external effects can be limited then only by restricting the class of internal events that cause external effects warranting intervention. A constitutional analysis would need to construct a normative rationale for identifying the types of effects which could justify intervention. We can pursue this inquiry along three different possible dimensions of normative analysis: positivism, natural law, and historicism.¹²⁴

120. See *supra* notes 74–78 and accompanying text (discussion of “enforcement measures” exception to Article 2(7) and the meaning of enforcement measures under Chapter VII, which must be predicated on a finding under Articles 41 and 42 of the “existence” of “a threat to the peace, breach of the peace, or act of aggression”).

121. For a classic exposition of the available theories, see KENNETH N. WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS* (1954) (locating the sources of violence three so-called “images”: the First Image looks to the evil nature of the person as the source of aggression; the Second Image looks to the internal structure of the state as the source for expansionism; and the Third Image looks to conditions of uncertainty in the system of states—in other words, international anarchy—as the source of violent action and reaction). See also KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979). The so-called “Realist” theory of international politics draws heavily from the First Image perspective. See HANS J. MORGANTHAU, *POLITICS AMONG NATIONS* 3–4 (2d ed. 1954) (describing political behavior as the product of a constant human nature). The Second Image is often associated with Marxist-Leninist positions. See Lenin, *Imperialism, the Highest Stage of Capitalism*, in *THE LENIN ANTHOLOGY* 204 (Robert C. Tucker ed., 1975). *but cf.* Mansfield & Snyder, *supra* note 68, at 97 (responding to an emerging literature arguing that, to the contrary, market democracies are less likely to engender international violence). For the classic exposition of the Third Image view, see generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977).

122. The seminal formulation of general causation in the study of international violence is Thucydides’s claim in explaining the Peloponnesian War that “what made war inevitable was the growth of Athenian power and the fear which this caused in Sparta.” THUCYDIDES, *THE PELOPONNESIAN WAR* 49 (Rex Warner trans., 1980); For a now classic argument questioning this “inevitability of war” thesis, see generally DONALD KAGAN, *THE OUTBREAK OF THE PELOPONNESIAN WAR* (1969).

123. See Slaughter, *The Liberal Agenda for Peace*, *supra* note 62, 381–85; see also Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); and Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

124. Answering interpretive questions of this complexity requires, as Dworkin has argued, an underlying theory of justification. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* vii–viii (1978). As Harold Berman has made clear, the history of legal philosophy reveals three distinct principles for justification of a legal order, including constitutional orders, each of which can take many different forms but may generally be described as positivist, natural law, and historical jurisprudence. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Seldon, Hale*, 103 YALE L.J. 1651, 1655 n.8 (1994).

1. The Positivist Dimension

A positivist account will interpret the constitutional order generally to conform to some principle of utility maximization.¹²⁵ A variant of this methodology is rational choice theory, which undergirds much of the hegemonic stability theory that explains the initial emergence of international institutions. Under hegemonic stability theory, intervention by the leading power is justified from a utility maximization standpoint because the hegemon provides a public good of stability for the international community that other states could not provide individually and, because of their incentive to free ride on the hegemon, other states would not provide collectively.¹²⁶ Collective intervention, on the other hand, might be seen as even more morally justified under a utilitarian calculus, given the efficiencies achieved through *ex ante* consent to a process of decision-making, such as that given by U.N. Member States to the decisions of the Security Council, and the reduced risk of errors through compliance with that process.¹²⁷ Yet, because positivist reasoning seems likely to lead to utilitarian moral discourse, and it is artificial even to talk about maximizing utilities for states as such, positivist theories of legitimacy in international law will likely be even less satisfying than they are in the domestic context.

2. The Natural Law Dimension

"Substantive morality," as one scholar has suggested, may also be a dimension along which the international constitution could be justified.¹²⁸ Currently, the chief alternative to teleological theories of justification is the neo-Kantian, hypothetical social contract

125. See, e.g., W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990) [hereinafter Reisman, *Sovereignty and Human Rights*] (relying on Article 1 of the Charter's statement of "purpose" to develop friendly relations "based on respect for the principles of equal rights and self-determination of peoples"); see also MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961) (the Yale School's account of public international law essentially involves the assessments of whether decisions conform with an implicit calculus measuring conformity with certain postulated values critical to world order).

126. For an argument that American hegemony is morally justified under a "liberal theory" interpreting liberalism in terms of a branch of rational choice analysis applied to international relations, see LEA BRILMAYER, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD* 115-25 (1994) (articulating and critiquing the "hegemonic stability" theory argument as a defense of American hegemony). It may well be, however, that Brilmayer's major premise is flawed—that the end of the Cold War has seen, not an increase in the power of the United States but rather, as Richard Haass writes, "[d]e-centralized decision-making and the diffusion of political authority increase rather than decrease the potential for international challenges and crisis." HAASS, *supra* note 67, at 3.

127. See BRILMAYER, *supra* note 126, at 157. Brilmayer argues that:

Consent to these international institutions validates the decisions these institutions reach. . . .

Of course, there is always the possibility that one of [the Security Council's] decisions might be a mistake. But the very fact that a decision process exists seems to suggest that the resulting decision is authoritative so long as the proper process was followed. Errors are validated so long as they are made in the appropriate way, and it is usually easier to determine whether processes were followed than whether the decision itself was correct on its merits.

Id. See also Murphy, *supra* note 62, at 248-49 (articulating a rule-utilitarian conception of the "legitimacy" of collective intervention under Chapter VII authority, analogous perhaps to Brilmayer's inquiry, BRILMAYER, *supra* note 126, at 153-59, into the underlying moral justification for hegemonic intervention).

128. BRILMAYER, *supra* note 126, at 141-66.

philosophy of John Rawls.¹²⁹ Its major premise, however, is identifying an appropriate unit of analysis.¹³⁰ Is the international community a community of states or of peoples? Neither? Both? The traditional model of state sovereignty constitutes an international society on state-centric principles. But, from a moral standpoint, it seems quite clear that the reification of the state to construct a building block or unit of analysis for moral discourse is problematic. Given the risk of error by individual states in proceeding on the basis of any particular moral theory,¹³¹ it is hard to see how even states acting collectively could avoid making at least some errors in the application of moral principles to supranational governance.¹³²

3. The Historicist Dimensions

Finally, states may well serve as proxies for individuals under a theory that posits that individuals have interests and rights that are best understood as collective in character. Thus, these rights of individuals as part of groups are historically rooted and culturally particular.¹³³ Such an argument would address the artificiality, under positivist or natural law theories, of attaching moral weight to the views of states as such. A historically-grounded account can be presented, then, relying on the state as the unit for analysis but also as a proxy for communities.¹³⁴

129. RAWLS, A THEORY OF JUSTICE, *supra* note 89 (a modern formulation of the idea that reason itself can provide a justification for moral commands, and thus the legitimacy of a constitutional order, through the thought-experiment of a hypothetical social contract concluded through moral reasoning under conditions of bounded rationality by moral agents in an "original position"). See also Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992) (general argument that international law should be understood in terms of the rights of persons rather than the rights of states). Tesón thus employs this natural law perspective to account for one feature of the international constitution imagined here, the legitimacy of humanitarian intervention. See TESÓN, HUMANITARIAN INTERVENTION, *supra* note 89, at 111–23.

130. Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84, 109–18 (1990) (arguing for the congruence of principles of domestic and international justice). But see Smith, *supra* note 82, at 1572–73 (suggesting the incongruity of moral reasoning from individualist premises in the international context and, thus, doubting the existence of a moral dimension in international law).

131. See BRILMAYER, *supra* note 126, at 158 ("To the extent that the hegemon acts on self-interest or on its own erroneous view of what morality requires, weaker states are correct in complaining that their legitimate prerogatives have been diminished while the power of the hegemon has been increased.").

132. But see *id.* at 157 (arguing that "errors" by the Security Council in interpreting its jurisdiction to determine the existence of a threat to international peace and security are validated if "the proper process was followed").

133. See generally MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (offering an alternative theory of domestic justice grounded on community rather than individualist values).

134. Michael Walzer, for example, has relied on these themes to articulate a theory of nonintervention. See Walzer, *Moral Standing*, *supra* note 89 (arguing against a general principle favoring hegemonic or other intervention). Walzer supposes that even in the case that a non-democratic culture could through the delivery of a potion be instantaneously transformed into a democracy—for example, Algerians into Swedish democrats—it would still be illegitimate, on pragmatic but more critically on moral grounds, to administer the potion. *Id.* at 225. Brilmayer seems to acknowledge that Walzer is right to be "concerned that the right to intervene gives authority to foreigners, in contrast to a right of communal integrity, which preserves decision-making authority for the community itself." BRILMAYER, *supra* note 126, at 155. Yet she also points out that even Walzer concedes exceptions for cases of genocide and multi-ethnic states. *Id.* at 250 n.23 (citing Walzer, *Moral Standing*, *supra* note 89, at 216; and MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 89–108 (1977)). Finally, Brilmayer observes that most people would not agree with Walzer that use of the potion to restructure Japanese or German militarism would have been illegitimate. *Id.* at 50–51; see also Anthony D'Amato, *The Primacy of Individual Freedom*, in INTERNATIONAL LAW ANTHOLOGY 260, 266–67 (Anthony D'Amato ed., 1994) (asking whether, according to Brilmayer, some cultures "do not deserve to be preserved." BRILMAYER, *supra* note 126, at 250 n.22).

However, even under this approach, there is always a danger in unreflectively taking every state, and even every decision of fully democratic states, as reliable expressions of the wishes of historical communities. Doing so often results in reifying the state and legitimizing the status quo.¹³⁵ In the face of the acknowledged inequalities of international life, state-centered analysis tends to undermine the employment of substantive principles of legitimacy that would instead focus on the fairness of particular outcomes.¹³⁶ State-centered analysis would also trivialize Article 2(7) of the Charter, leaving it to be understood only in the vaguest formal terms.¹³⁷

How, then, can the richness of the historicist argument be transformed into a persuasive justification for supranational governance? Ideally, a historical account would reveal and preserve the values reflected in the underlying communities which constitute the state. As Anne-Marie Slaughter suggests, for example, a new norm of justified intervention might well “resolve the apparent contradiction between security and autonomy values as they relate to nationalist conflict” if it “might rest on an affirmative right of democratic governance with protection of minority rights.”¹³⁸ Slaughter further observes that

Brilmayer and D’Amato’s objections do not really go the heart of Walzer’s theory, however. Their counter-examples of German and Japanese militarism seem, instead, to involve clear external effects which, even under a utilitarian view of the doctrine of nonintervention, would readily admit even the use of force. Thus, they do not really attack head on the harder case Walzer imagines of no postulated external effects. On the other hand, as the German and Japanese cases reveal, the best measure of how a regime will behave externally is how it treats its own citizens. See also Mansfield & Snyder, *supra* note 68 (discussing a democratic peace theory); Jim Hoagland, *Simply China*, Wash. Post., June 4, 1995, at C7 (“[C]ontinuing struggle between a decomposing Communist regime and people who demand no more than democracy and dignity is a straightforward affair”). In the end, the one clearly persuasive feature of Walzer’s argument, as even Brilmayer points out, is that “strong states must pursue their moral objectives with restraint, self-doubt, and some humility.” Brilmayer, *supra* note 126, at 154.

135. Murphy, for example, relies on the received understanding that the Charter would recognize, recreate, and rely upon patterns of hierarchy in the international system conducive to order—thus, perfecting the failed nineteenth century “Concert of Europe.” Murphy, *supra* note 62, at 257. Indeed, argues Murphy, “the United Nations founded itself on a concept of relating responsibility for the maintenance of peace and security to the self-interest of major powers.” *Id.* at 256.

136. *Id.* at 250 n.174 (relying on FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 69, to divorce conceptions of legitimacy from substantive justice); see also BRILMAYER, *supra* note 126, at 157 (validation of errors by “proper process”). For a critique of this approach, see Alvarez, *supra* note 96, at 207–08, 247 (arguing that Franck’s concept of legitimacy, in treating justice concerns as conceptually unrelated phenomena, assures that Franck’s methodology is a conservative force promoting existing standards and interests of existing states). Whatever the systemic implications of Franck’s approach may be, it clearly can be used to reproduce the utilitarian justificatory vocabulary dominant in the nineteenth century; for a veil descends upon the international decision-making process in which: “[d]ecisions must be taken through informal negotiations and the emergence of a consensus that takes account of the concerns of major powers both in proceeding with collective action and in preventing such action. Flexibility is gained by formulating sanctions pursuant to an ongoing process of balancing interests among these states.” Murphy, *supra* note 62, at 260. At most, “[p]articipation of other states in the process is desirable to ensure that the views of the less powerful states are considered.” *Id.* Under this approach, the noninterference principle could become simply a quantitative standard, subject to arbitrary evaluations of the degree of spillover effects sufficient to marginalize the nonintervention duty and divorce it from any sturdy basis of substantive morality.

137. See, e.g., Murphy, *supra* note 62, at 270–71. Murphy asserts that:

Although Chapter VII trumps the prohibition of Charter Article 2(7) on interfering in matters which are essentially in the domestic jurisdiction of states, Chapter VI, relating to the investigation of situations that might lead to disputes, does not. Consequently, the non-intervention principle in Charter Article 2(7) *weighs against* systematic efforts to obtain information that would reveal a likelihood of aggressive behavior by a state.

Id. (emphasis added).

138. Anne-Marie Slaughter Burley, *Commentary*, in *EMERGING NORMS OF JUSTIFIED INTERVENTION*, *supra* note 70, at 111, 112 (citing the example of the United States conditioning recognition of new states within the Commonwealth of Independent States on their compliance with these internal norms). The U.S. position appears

"multilateral action (. . . assuming deliberation) should assure that intervention is more than an instrument for the naked self-interest of a stronger party."¹³⁹ She adds, however, that it would assume "a minimally equal distribution of power in the deliberative body" and "minimal ideological convergence," both of which she considers potentially problematic assumptions in today's world.¹⁴⁰ More important, because "minority rights" may well be conceived as individual rights of members of minority communities, rather than the rights of communities as such, her approach risks replacing the communitarian dimensions of the historicist approach with an individualist methodology more consistent with natural law reasoning.¹⁴¹

C. *Supranational Authority and Federalism: The Relation Between the Rise of Supranational Institutional Authority and Normative Discourse*

What might lead us to believe that a supranational polity has emerged requiring normative justification. At this stage in the argument, it should be enough to point to indicators of change in the powers available to the international community under the Charter that moves substantially beyond theories of international governance grounded only on the consent of states. One indicator of such change is recent state recognition practice during the denouement of the Cold War and the remarkable activism of the post-Cold War Security Council.¹⁴²

Community membership and self-definition seems to be a critical feature of constitutional discourse. J.H.H. Weiler has, for example, employed a suggestive methodology, built around Albert Hirschman's analysis of the relationship between the political and economic phenomena,¹⁴³ to account for the emergence of supranational

to be more complex, however, than Slaughter recognizes. See *infra* note 148 (discussing President Bush's statement of Dec. 21, 1991).

139. *Id.* at 111 (commenting on Damrosch's thesis, in Damrosch, *Changing Conceptions*, *supra* note 70, that collective intervention is now legitimate while unilateral intervention remains prohibited).

140. *Id.* at 112.

141. Thus, Slaughter challenges the very premises of sovereignty when she suggests that:

[I]f . . . states were to renounce a conception of absolute and exclusive sovereignty in favor of a conception of permeable sovereignty in their relations with one another, they could contribute to changing conceptions of intervention elsewhere in the world. Permeable sovereignty may well be not only compatible with, but also a precondition for, the liberal peace.

Id.

Slaughter did not, however, argue that sovereignty has dissolved; she simply suggested that constitutional action could, and should, be taken to dissolve it. Indeed, she has recently called for a formal amendment of Article 2(7) to, in effect, constitutionalize the changes she earlier proposed. See Slaughter, *The Liberal Agenda for Peace*, *supra* note 62, at 408–13 (advancing a neo-Federalist argument that respect for the sovereignty of states as constituent units in the U.N. as a "forum for global governance"—rather than a true constitution—should be limited to sustaining the capacity of state institutions to provide fundamental services to the state's citizens). In sum, Slaughter's analysis, unlike the descriptive orientation of this Article, is ultimately prescriptive.

142. Professor Reisman, for example, illustrates his theory of revised Charter interpretation by reinterpreting the *Tinoco Claims* arbitration precedent; under an interpretation based on "popular sovereignty," the successor government should not be bound by the obligation incurred by Costa Rica during General Tinoco's rule since states would be under a duty not to recognize the acts of an undemocratic regime which had overthrown democratic self-rule. See Reisman, *Coercion and Self-Determination*, *supra* note 71, at 644–45; Reisman, *Sovereignty and Human Rights*, *supra* note 125; *Tinoco Claims Case* (Great Britain v. Costa Rica), 1 R. Int'l Arb. Awards 369 (1923) (opinion of Justice Taft), *reprinted in* 18 AM. J. INT'L L. 147 (1924) (Opinion of Justice Taft).

143. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

constitutionalism in the European Community.¹⁴⁴ With closure of selective exit, the Weiler-Hirschman approach observes the increase in the importance of authoritative decision-making by the relevant institutional authorities and, accordingly, a demand for greater "voice," or participatory democracy.¹⁴⁵ Thus, the constitutional mode of analysis captures in a way that simple treaty analysis cannot the so-called Democracy Deficit that now seems to plague international decision-making.¹⁴⁶

At its core, a constitutive theory of recognition gives the international community—the Security Council and General Assembly acting together in the case of U.N. membership¹⁴⁷—the power selectively to foreclose entry into the international system.¹⁴⁸

144. See Weiler, *supra* note 99, at 2412 (defining "Selective Exit" as "the process [of] curtailing the ability of the Member States to practice a selective application of the *acquis communautaire*, the erection of restraints on their ability to violate or disregard their binding obligations under the Treaties and the laws adopted by Community institutions").

145. Cf. Alvarez, *supra* note 5, at 12 (relying on Weiler to argue that as the U.N. more successfully legislates, pressure will increase for more accountability from its executive institutions).

146. See *id.* at 12–15.

147. See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 126 (1987) ("The United Nations has for practical purposes become the collective arbiter of statehood through the process of admission and non-recognition."). Cf. H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 38–41, 52–58 (1947) (explicating the constitutive view as a matter of pre-Charter state practice). Because the constitutive theory seemed to predicate the legal existence of a state on the unlimited discretion of states that are already members of the community of states, Lauterpacht believed it to be circular, for "[i]t seems irrelevant to predicate that a community exists as a State unless such existence is treated as implying legal consequences." *Id.* at 38. But the same observation might be made about the existence of "a community of states." D'Amato seems to make this point in Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293 (1984), reprinted in *INTERNATIONAL LAW ANTHOLOGY*, *supra* note 134, at 37, 41–44 (treating "reciprocal entitlements" as the source of international legal obligations for states). Thus, that decisions by the community of states on membership by new states would be governed by law would seem to be implicit in the very idea of a community of states.

148. The revival of the constitutive theory of recognition thus plays a special role in the emergence of the supranational constitution. The EC, for example, articulated criteria for recognition of the new states that imposed requirements on the internal structure of the newly recognized states, focusing especially on the treatment of minorities. See European Political Cooperation, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485, 1486–87 (1992); see generally Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

Similarly, the strong position of the United States in opposing the automatic membership of Serbia/Montenegro in the United Nations seems to suggest that in practice, if not in theory, the United States believes the international community has substantial power to exclude potential members. See, e.g., S.C. Res. 777, U.N. SCOR, 47th Yr., Res. & Dec., at 34, ¶ 1, U.N. Doc. S/INF/48 (1992) (under the U.S. interpretation, establishing that Serbia/Montenegro was not the automatic successor of the Former Socialist Federal Republic of Yugoslavia and needed to apply for membership); see generally Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29, 57–63 (1995) (discussing the international response to Resolution 777, *supra*).

On the other hand, the U.S. appears to have linked only the commencement of diplomatic relations, not recognition of state or government, with the compliance by the newly independent states of the Commonwealth of Independent States with specified conditions. President Bush on December 25, 1991, announced, in respect of the dissolution of the former Soviet Union, that:

[T]he United States also recognizes today as independent states the remaining six former Soviet Republics—Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia, and Uzbekistan. We will establish diplomatic relations with them when we are satisfied that they have made commitments to responsible security policies and democratic principles, as have the other states we recognize today.

Vol. 2, Nos. 4 & 5, FOREIGN POL'Y BULL. 12 (Jan.–Apr. 1992), reprinted in HENKIN ET AL., *supra* note 69, at 253.

Admittedly, the President's statement beginning his announcement that, "based on commitments and assurances given" by some of the states, the United States would take certain steps, including recognition and establishment of embassies, might be interpreted to adopt a constitutive theory of recognition. *Id.* at 252. However, the fact that the statement later made clear that the President would withhold only diplomatic relations

Another manifestation of this phenomenon of a community determination constituting the state may well be the Security Council's willingness to legislate, in effect, a boundary between Iraq and Kuwait.¹⁴⁹ Finally, the new International Criminal Courts for the Former Yugoslavia and Rwanda,¹⁵⁰ together with the progress toward the establishment of a new general International Criminal Court, suggest the beginnings a moral basis for supranational authority.¹⁵¹ These new developments suggest deep changes in the meaning of the U.N. Charter.

Clearly, the simple Westphalian model of a world of independent states cannot account for the emergence of supranational collective action. Just as clearly, we have not reached a clearly effective world government.¹⁵² States still matter. Thus, the task is to provide a persuasive legal account of the balance between the integrative and disintegrative tendencies in world governance; in other words, how much authority has been conferred to the Security Council and how much to states?

Answering these questions requires a theory of legitimacy. Thus, Professor Reisman, pointing to the failure of the collective security system of the Charter to function as it was intended due to the Cold War, has observed that Article 2(4) must be interpreted in a manner consistent with current community norms and the requirements of minimum public order, for "[t]he basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them."¹⁵³ Professor Reisman's argument suggests a key insight that explains the emergence of the supranational constitution: a constitution must be tied to a theory of legitimacy—in Reisman's view, the theory of popular sovereignty.¹⁵⁴ Despite challenges to Professor Reisman's teleological approach, this premise seems shared by his critics.¹⁵⁵

from the new states that had not made the requisite commitments suggests that the United States did not claim the power to withhold recognition. *Id.* at 253. The U.S. practice does not seem to establish firmly that the U.S. is now uniformly following the constitutive theory of recognition.

149. See S.C. Res. 773, U.N. SCOR, 47th Yr., Res. & Dec., at 72, U.N. Doc. S/INF/48 (1992) ("guarantee[ing]" the Iraq-Kuwait boundary as set forth in accordance with the Agreed Minutes regarding the restoration of friendly relations, recognition and related matters Oct. 4, 1963, Kuwait-Iraq, 485 U.N.T.S. 321, and the UNITED NATIONS, SECURITY COUNCIL, FINAL REPORT OF THE BOUNDARY DEMARCATION COMMISSION, ANNEX, U.N. Doc. S/25811 (1993), reprinted in 32 I.L.M. 1427, 1429 (1993)); criticized in Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature*, 27 N.Y.U. J. INT'L L. & Pol. 103, 147 (1994) (arguing that "adjudication" of a boundary is not within the Security Council's competence given certain conceptions of the judicial process involving procedural due process); but see Murphy, *supra* note 62, at 243–44 (treating the boundary demarcation as a potentially "useful" precedent).

150. See S.C. Res. 827, U.N. SCOR, 48th Yr., Res. & Dec., at 29, ¶ 2, U.N. Doc. S/INF/49 (1993) (establishing a tribunal for prosecution of "serious violations of international humanitarian law committed in the territory of the former Yugoslavia"); S.C. Res. 955, U.N. SCOR, 49th Yr., Res. & Dec., at 15, ¶ 1, U.N. Doc. S/INF/50 (1994) (establishing a similar tribunal for the prosecution of, among other things, genocide in Rwanda).

151. See James Crawford, *Current Development: The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404 (1995); But see AGENDA FOR PEACE, *supra* note 15, ¶ 43 (disavowing punitive dimension to Security Council action).

152. For a set of proposals for new treaties and implementation of certain Charter provisions which might well yield an effective world government, see Stanley Hoffmann, *Delusions of World Order*, N.Y. REV. BOOKS, Apr. 9, 1992, at 37, 40–43.

153. See Reisman, *Coercion and Self-Determination*, *supra* note 71, at 643.

154. Reisman observes that Article 2(4) "rests on and must be interpreted in terms of [the] key postulate of political legitimacy in the 20th century. Each application of Article 2(4) must enhance opportunities for ongoing self-determination." *Id.* Reisman developed this thesis to address its implications for the theory of sovereignty, which he characterized as an "anachronism" when used, as in classical international law, to reflect the concept of monarchical sovereignty extant during international law's formative period. See Reisman, *Sovereignty and Human Rights*, *supra* note 125, at 869 ("Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its 'invasion' of

This Article argues that, while the theory of popular sovereignty may be a starting point, the historicist, natural law, and positivist conceptions of legitimacy each play a role in the justification of the supranational constitutional order. These moral dimensions can be translated, in the context of articulating a federalist relationship between states and the supranational entity, into arguments based, respectively, on community, liberty, and utility for the autonomy of constituent units in the supranational polis.

V. THE FEDERALIST THEORY OF SUPRANATIONAL CONSTITUTIONALISM

We now turn to the case for a constitutional analysis, along federalist lines, that legitimizes the new powers exercised by the supranational community. Part VI will then account for the possibility of constitutional change without formal amendment through transformative processes similar to those described by Professor Ackerman in relation to informal change in the U.S. Constitution. Both sections draw from the political theory of *The Federalist* and account for the demise of the original meaning of Article 2(7) as normative creativity in a constitutionalization of higher values rather than simply the interpretation of existing law. Once these premises are developed, Part VII of the Article will offer a resynthesis of Article 2(7) with Chapter VII of the U.N. Charter, drawing on the arguments from community, liberty, and utility for federalist autonomy that are based on historicist, natural law, and positivist justificatory rhetoric.

A. *Legitimacy and Community*

Max Weber's conceptual categories—charisma, tradition, and legality—form the starting point for modern discussions of legitimacy, a term Weber used simply to measure the likelihood that an authority's command would be followed by its subjects.¹⁵⁶ Weber's

the sovereign's *domaine reserve*."). Rather, while "[i]nternational law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty." *Id.*

One potential gap in Professor Reisman's approach, however, is that it fails to provide an historical or moral account for the legitimacy of constitutional change in the nature of sovereignty. Because the twentieth century conception of sovereignty was as widely shared in 1945 as it was in the late 1980s, Professor Reisman seems to advance a theory that the Charter is being misinterpreted and has always been misinterpreted. His methodology cannot, nor does it seem it was ever intended to, account for the radical change in the Charter's meaning after the end of the Cold War.

155. This teleological method of interpretation has been criticized by Professor Schachter as legally inadequate, for:

Reisman regrettably does not adequately explicate the grounds on which it is based. He does not tell us whether his assertions rest on such empirical findings as the positions taken by governments (in words or conduct) or on the "expectations" of peoples derived from patterns of conduct or on strongly felt popular demands. Nor does he attempt to present a philosophical analysis that would be based either on deontological grounds or on a consequentialist utilitarian approach. He apparently considers it sufficient to emphasize the value of freedom of political choice by peoples everywhere and to assert the principle of ongoing self-determination as a higher law that would allow the use of force despite the literal interpretation of Article 2(4).

Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 647 (1984). Note, however, that Professor Schachter concedes the possibility that "empirical findings" and "a philosophical analysis" could sustain Professor Reisman's conclusions. *Id.* This Article is an effort in that direction.

156. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 324 (Talcott Parsons, ed., 1947) ("It is necessary, that is, that there should be a relatively high probability that the action of a definite, supposedly reliable group of persons will be primarily oriented to the execution of the supreme authority's general policy and specific commands."); cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact."). Indeed,

“legal” form of legitimation is premised on a particular kind of relation between the authority and its followers, one that involves rational or normative discourse.¹⁵⁷ Ultimately, then, legitimacy of authority depends not on a legal or philosophic analysis of the procedural or substantive characteristics of the community decision, but on the values of the particular community.¹⁵⁸ It has been suggested that community-based theories of legitimacy tend to resist change, but this only ignores the possibility that a community could reorganize its conceptions of legitimacy through engaging in constitutional politics.¹⁵⁹

B. *The Emergence of a Political Community*

Is the strength of the nonintervention principle an indicator that a community has not been formed? If so, the progressive decline of the nonintervention principle in international law is a measure of the emergence of a supranational community. In assessing whether this actually is happening, do we have any examples to work from? Despite Stone’s suggestion

modern psychology analyzes rule-compliance as ultimately about the needs of followers. See Jerrold M. Post, *Narcissism and the Charismatic Leader-Follower Relationship*, 7 POL. PSYCHOL. 675, 676 (1986) (drawing on Weber, Dr. Post writes: “Charismatic leadership is a relationship between a leader and a group of followers that has [certain] properties . . . Each of these properties relates to a perception, belief or response of the followers.”).

157. See also FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 69, at 203 (“What a rule community, a community of principle, does is to validate behavior in accordance with rules and applications of rules that confirm principled coherence rather than acknowledging only the power of power.”).

158. See *id.* at 204. Franck explains that:

The idea that the degree of legitimacy of rules and institutions is measurable itself can only be sustained if there is a community which agrees upon and applies that standard. In this sense, community is not only the essential ingredient in an ultimate rule of recognition, it is also the *sine qua non* of the entire enterprise of defining legitimacy.

Id.

Some, however, believe “Franck’s view of community and the resulting rule of recognition it supposedly generates is so barren of content that some might question whether Franck really has described either a ‘community’ or a viable rule of recognition at all.” Alvarez, *supra* note 96, at 249.

Perhaps this criticism of Franck’s views is more with the kind of community he envisions rather than with whether he envisions a community. Another way to put Alvarez’s point is that Franck’s concept of “legitimacy” is based on a conception of community that does not take into account the moral dimension of community life. In Professor Burton’s terms, Franck’s concept may well express the supreme authoritativeness of a standard of conduct—that is to say, a standard that “has or claims some privileged role in the practical deliberations of its addressees.” See Steven J. Burton, *Law As Practical Reason*, 62 S. CAL. L. REV. 747, 771 (1989). However, it should be understood that there are several possible forms of supreme authoritativeness in social authority. *Id.* at 758 (advancing a conception of law as “a form of social organization through the systematic institutionalization of supreme authoritative standards of conduct” having an internal perspective). Franck’s concept of legitimacy may simply be a form that is contingent only on prudential responses to coercion. *Id.* at 772–74. By contrast, the supreme authoritativeness of standards of conduct that are themselves based on some moral dimension is not contingent on prudential responses to coercion (or the even less developed form of practical reason in which responses are based merely on acceptance by a social group). *Id.* at 760, 773–74. Thus, in Burton’s vocabulary, Franck’s concept of legitimacy is recognizably legal, even if amoral, in the sense that any system of practical reason is a legal system. *Id.* It may be a step beyond Hart’s vision of international law as a primitive legal system in which all norms are based on acceptance by a social group. *Id.* But it would still fall short of a conception of the international community as a moral community.

159. But see Alvarez, *supra* note 96, at 208–9, 247–48, for the argument that Franck’s concept of legitimacy is state-centric and normatively conservative, and may underestimate the potential for normative change in the international system (even if one accepts Franck’s exclusion of moral or justice concerns).

Change can come from politics, especially constitutional politics. See *infra* text accompanying notes 233–60, for a political process account of constitutional change in the international system. Under this suggestion, international constitutional claims do not flow from moral reasoning but rather from the values chosen in a process of deliberative democracy. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 465–71 (1989) [hereinafter Ackerman, *Constitutional Politics*] (arguing that constitutional politics may or may not result in the choice of values that fit preconceived notions of the so-called “Rights Foundationalists”).

to the contrary,¹⁶⁰ the emergence of the European Union as a supranational political entity may not be the only such case in world history. As Yale law professor Akhil Amar has argued, the ratifications by individual states of the constitution drafted at the Philadelphia convention "formed the basic social compact by which formerly distinct sovereign Peoples, each acting in convention, agreed to reconstitute themselves into one common sovereignty."¹⁶¹ But, according to Harvard political scientist Samuel Beer, the single "People" of the United States was constituted as early as the time of independence from Great Britain.¹⁶² He argues "the people of the United States established a general government by the Articles of Confederation of 1781 and then by the Constitution of 1787."¹⁶³ Each believes, however, that there was a constitutive moment. Both Beer and Amar agree that from the moment each one of the states ratified the Constitution, it was barred from secession. But, for Beer, this bar existed from the moment the Declaration of Independence was promulgated.¹⁶⁴ For Amar, it flows from the text of Article V of the Constitution.¹⁶⁵ Thus, both reject as a tool for modern U.S. constitutional theory the so-called compact theory of the Federal Constitution, under which each state was a subject of international law and retained the right to secede.¹⁶⁶

The compact (or treaty) theory flows in part from the idea that the Framers really knew of only two distinct kinds of regimes, a national state and a federation.¹⁶⁷ The term "federation," etymologically drawn from the Latin expression *foedus*, signifies an

160. See Stone, *supra* note 96, at 473.

161. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1460 (1987).

162. Samuel Beer criticizes Amar's theory of the emergence of sovereign peoples in the states in 1776 followed by the emergence of a sovereign people of the United States in 1788 as an unjustified response to what Amar called "Madison's straddle," under which Madison suggested, *see, e.g.*, THE FEDERALIST NO. 39 (James Madison), that the Constitution made the people of the states one people for some purposes but not for others. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 319 (1993) (citing Amar, *supra* note 161, at 1452 n.113). Samuel Beer argues that Amar's historical account is simply wrong, since the Continental Congress itself authorized the states to assert their independence from Great Britain and thus was already functioning as the instrument of the already constituted American people before the constitution of peoples among the individual states. *See id.* at 200-02. Beer adds that Article VII of the Constitution, which provided for its entry into force upon ratification for ratifying states only upon ratification by the ninth state, demonstrated that one sovereign people already existed prior to ratification. *Compare id.* at 332 with Amar, *supra* note 161, at 1460 & n.154. In Beer's view, a majority of the American People (a sum that would have been met by ratification of even the nine least populous states) approved the establishment of the constitution. Once nine states established the constitution, holdouts would have no choice but to join. Under a sophisticated employment of rational choice theory, Beer thus argued, the Framers were able to ensure the reality of a constitutional scheme applicable to all the states when a majority of the American People approved while maintaining the fiction of absolute freedom and the theoretical possibility of secession by each of the holdout states. BEER, *supra* at 332.

163. See BEER, *supra* note 162, at 137.

164. *Id.* at 14, 379

165. See Amar, *supra* note 161, at 1462 n.162.

166. The alternative version of the Nationalist theory, as Amar points out, *id.* at 1452, locates the creation of one people in the Declaration of Independence or the adoption of the Federal Constitution. A Compact theorist might still come to the same conclusion as a national theorist on this point, however, because the constitutionalization of federal citizenship in the Fourteenth Amendment might have had the effect of constitutionalizing the verdict of the Civil War and, finally, creating a single People with a common federal citizenship. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842, 1872-75 (1995) (Kennedy, J., concurring) (arguing that rights of "federal" citizenship, which include the right to elect representatives to federal office in accordance with the Qualifications clause, may not be abridged by the states); But *see* ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 33-54 (1975) (arguing that federal "citizenship" plays no central role in the American Constitution).

167. See Alan Gibson, *The Legacy and Authority of the Founders*, 56 REV. POL. 555, 572 (1994) (review essay critiquing, *inter alia*, the classic work of MARTIN DIAMOND, *AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT* (William A. Schambra ed., 1992)).

arrangement which is the subject of international, not national, law.¹⁶⁸ Under international law as it was understood at the time of the Framers, this federation implied a unilateral right of withdrawal, even though Article XIII of the Articles of Confederation expressly provided that “the Articles . . . be inviolably observed by the state we respectively represent, and that the union shall be perpetual.”¹⁶⁹ Within the Framers’ theory of international law, then, there was no distinction between the Articles of Confederation and the Federal Constitution, for a federation was, just as much as a confederation, a creature of international law.¹⁷⁰ Some scholars have therefore argued that the Framers’ failed to choose between the two theories of treaty and nation. They fudged the point in Madison’s theory of a “‘compound’ with national and ‘authentic’ federal features, not as a novel synthesis.”¹⁷¹

On this reasoning, if the Federation of 1789 was a constitutional creature, then so too was the Confederation of 1781. Accordingly, when Amar dismisses the constitutional character of the United Nations by lumping it with the Articles of Confederation¹⁷²—seeing the Articles of Confederation as “not much more” than the United Nations in 1987—he suggests a point of departure for undertaking an analysis of the United Nations as an emerging constitution. If we are prepared to consider the Articles of Confederation, as

168. See Amar, *supra* note 161, at 1449 n.92.

169. Articles of Confederation, art. XIII, reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL DEBATES 357, 364 (Ralph Ketcham ed., 1986); see generally Vattel, THE LAW OF NATIONS, *supra* note 21. Today the issue would be more complicated, since one would have to invoke the exception found in Article 56 of the Vienna Convention, *supra* note 49, and customary international law, to the general rule that, unless the parties’ express an intent to the contrary or the nature of the regime so indicates, withdrawal is not permitted from a treaty that does not otherwise expressly provide for withdrawal. Because Article XIII of the Articles of Confederation expressly provided for its “perpetual” application, one would imagine that a right of withdrawal would be even more difficult to imply than would normally be the case under conventional treaty law doctrine.

For a discussion of the problem of withdrawal in the U.N. Charter context, see *infra* text accompanying notes 458–68. Under the theory of the emergence of an international constitution posited in this Article, withdrawal or exit would be precluded in the same manner as Weiler has argued withdrawal or exit is barred in the EU supranational constitution. See Weiler, *supra* note 99.

170. Gibson, *supra* note 167, at 571–72.

171. *Id.* at 572. But see BEER, *supra* note 162, at 244–278 (analyzing Madison’s theory as a distinctively novel synthesis of the treaty and national theories constructed on a distinctive philosophy of government that would solve the perceived conflict between the size and internal governance of states).

172. Amar relies on Madison’s statement in THE FEDERALIST NO. 43 (James Madison) that “[a] compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties,” to argue that:

In short, the “United States” in 1787 was not much more than the “United Nations” is in 1987: a mutual treaty conveniently dishonored on all sides. Indeed, it was precisely the Articles’ status as a fallen treaty that Madison seized on to justify the Philadelphia Convention’s bold declaration that its new Constitution would go into effect among any nine states that chose to ratify it—notwithstanding the Articles’ clear requirement that all amendments to it be unanimously adopted.

Amar, *supra* note 161, at 1448 (quoting THE FEDERALIST NO. 43, at 279–80 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST]).

Amar’s reliance on Madison’s statement may be somewhat misplaced, however, for Amar fails to quote an earlier sentence in the same passage which reveals that Madison may well have taken a different view of the overall character of the status of the Articles. Madison prefaced the comment in the section Amar quotes with the following observation: “It has been hitherto noted among the defects of the Confederation that in many of the States,” not all, “it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require that its obligation on the other States should be reduced to the same standard.” THE FEDERALIST NO. 43, at 279 (James Madison). For purposes of making his argument for the supersession of the Articles by the Federal Constitution, then, Madison was simply arguing that the Constitution was more authoritatively an expression of the will of the People of the United States as a whole than were the Articles of Confederation. On this reading, Amar has not necessarily refuted Beer’s claim that the Articles were a national government constituted by a single People rather than a simple treaty governed by international law. Madison’s point was comparative, not absolute.

Beer argues, to be a functioning constitution of a single People, then might we not also view the United Nations Charter in the same way?

And, even if Amar is right that a "People" had been constituted before ratification of the Constitution, it would still be plausible to hold that the separate "Peoples" of the United Nations could create a constitutional order without creating a single "People". Recently, several justices of the U.S. Supreme Court have argued that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."¹⁷³ Accordingly, the "single People" model does not seem necessary to constitutional discourse so long as the "peoples" participating in community have expressed their consent to the common enterprise so that withdrawal is no longer a plausible option.

Can we find evidence of that consent in the U.N. Charter at the time of its adoption or when it was reconfirmed at the end of the Cold War?

C. *Text and Context in Constitutionalization*

The emergence of constitutionalism in the U.S. and the European Union was mediated through the adoption of specific texts embodying specific constitutional values.¹⁷⁴ The U.N. Charter could also constitute a textual foundation for a supranational constitution. But the textual moments do not need to coincide with the constitutive moments. Based on his study of the emergence of supranational constitutionalism in the European Union, Weiler argues that the actual transfer of power to a supranational entity can take place well after the formal transfer occurs.¹⁷⁵ Indeed, Weiler believes it is arguable that "the United States became truly federal only after the Civil War."¹⁷⁶ And, if Justice Thomas is correct that the U.S. Constitution was not premised on, and did not constitute, a single People of the United States,¹⁷⁷ then the fact that the U.N. Charter does not itself clearly constitute a "single People" does not preclude a constitutional approach.¹⁷⁸

173. *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842, 1875 (1995) (5-4 decision) (Thomas, J., dissenting).

174. See, e.g., Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome], as amended by Single European Act, 2 C.M.L.R. 741 (1987) [hereinafter SEA], as amended by Treaty on European Union, Feb. 7, 1992, 1 C.M.L.R. 719 (1992) [hereinafter Maastricht Treaty], reprinted in 31 I.L.M. 247 (1992).

175. Weiler, *supra* note 99, at 2471. Weiler contends that:

It is not an accident that some of the most successful federations which emerged from separate polities . . . enjoyed a period as a confederation prior to unification. This . . . simply suggests that in a federation created by integration, rather than by devolution, there must be an adjustment period in which the political boundaries of the new polity become socially accepted as appropriate for the larger democratic rules by which the minority will accept a new majority.

Id. See also Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CANADA-U.S.L.J. 111 (1984).

176. Weiler, *supra* note 99.

177. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting) (stating that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole").

178. The Charter's Preamble begins with the hint of a constitutional theory under Justice Thomas's approach: "We the Peoples of the United Nations . . ." But it ends with bow in the direction of a conventional treaty: "Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." U.N. CHARTER pmbl. The language thus expresses conflicting tendencies.

This premise does not mean that the use of the term "People" or "Peoples" in the constitutive instrument is a matter of irrelevance.¹⁷⁹ Rather, the use of the term "People" or "Peoples" suggests a substantive constitutional value—a particular view of the role and function of the constituent units of a larger integrated polity.¹⁸⁰ "Traditionally," as Weiler writes, "the relationship [between the general polity and its constituent units] in nonunitary systems is conceptualized by the principle of enumerated powers."¹⁸¹ But the relationship can also be described in larger terms as well, articulating the underlying rationales for the specific content of federal, or in our case supranational, powers.

D. Conceptions of Federalism

Constitutional values substantiating decentralization of power flow from a variety of perspectives. We can locate them, for purposes of exposition—as Professor Beer has in a recent study of the intellectual origins of U.S. federalism—in three different justifications for the existence of small states and thus their preservation in a federal system.¹⁸² We can extend this analysis to the problem of the role of states in a supranational constitution. The

On one hand, the ultimate source of authority appears to be the separate "Peoples" of the United Nations, speaking together for a constitutive moment but not as a single "People." As Amar points out, it would be tempting to find in the words "We the People" of the Constitution a dispositive answer to whether "the sovereignty of one united People, instead of thirteen distinct Peoples, provided the new foundation of the Federalist Constitution." Amar, *supra* note 161, at 1450. But he declines to do so because the Declaration of Independence and the Articles of Confederation both use the term "People," suggesting that a single People existed at the time each instrument was crafted—a conclusion Amar believes is not supported by the surrounding circumstances. *Id.* at 1450–51; *But see* BEER, *supra* note 162. Thus, Amar reasons, the mere use of the term "People" does not establish the existence of a constitutional regime. Amar, *supra* note 161, at 1460. Amar's reasoning for trivializing the expression "We the Peoples" in the Articles is thus not relevant to the meaning those words could have in the Charter. Yet, it would not seem prudent to rest the weighty conclusion that a supranational constitution has been created on three words alone. *Cf.* W. Michael Reisman, *Amending the U.N. Charter: The Art of the Feasible*, PROCEEDINGS OF THE 88TH ANNUAL MEETING OF THE AM. SOC'Y INT'L L. Apr. 6–9, 1994, at 108, 109 ("The 'deadest letter' in the UN Charter are in its very first words: 'We the peoples of the United Nations.'").

179. Virginia Gildersleeve, Dean of Barnard College and the lone American woman delegate at the San Francisco Conference, in fact insisted that the Charter open with the words "We the peoples," to the dismay of diplomats who believed the Charter could only be created by governments. *See* William Branigin, *U.N.: 50 Years Fending Off WW III*, WASH. POST, June 25, 1995, at A1, A22.

180. The textual basis might lie in distinguishing between the "Organization" of the United Nations and the United Nations itself. In the Preamble of the Charter, the "Peoples" assert that their agents, their "respective Governments," are the entities which "agreed" to and "establish" the "organization to be known as the United Nations." Notably, the Preamble emphasizes the treaty character of the "organization" by alluding to the "full powers" of the representatives of the Peoples' respective Governments. *See* Vienna Convention, *supra* note 49, art. 7, ¶ 1(a) ("A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if . . . [h]e produces appropriate full powers.").

On the other hand, the "Peoples" are defined as "Peoples of" a constituted community, the United Nations. *See* U.N. CHARTER pmbl. Accordingly, the Preamble's recognition of the treaty character of the institution, the United Nations Organization, created at San Francisco does not preclude another reading of the U.N. Charter itself, one that begins a process of constitutional integration of the United Nations, with the Organization serving simply as the initial platform for constitutional politics. *See infra* text accompanying notes 261–68, for an exposition of this conception.

181. Weiler, *supra* note 99, at 2432. A similar focus has appeared in current discussions of the U.N. Charter as a supranational constitution, with increased concern for a more precise statement of the "Purposes and Principles" of the U.N. *See* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 94–96 (1993) (pointing out that, though the vagueness of the Charter's purposes and principles is a "disappointment" to "judicial romantics," "a constitution is a continuing process" and thus one can expect a creative period of constitutional reform to remedy the inadequacies of the current text).

182. *See* BEER, *supra* note 162 at 179–80 (the "argument from community"), 178 (the "argument from liberty"), 180–85 (the "argument from utility").

arguments from community, liberty, and utility draw upon deeper philosophic dimensions as well, respectively from historical, natural law, and positivist theories of law, and morality.

1. The Argument from Community

The argument from community, according to Beer, originates in the Greek idea of the city-state as the “small, close-knit body of people bound together by their own distinctive common life” but later was expressed in the hierarchic conception of the cosmos that structured medieval political thought.¹⁸³ Under this hierarchic view, sovereignty was located in the monarch. But this did not mean that there were not limits on the monarch’s conduct derived from spheres of autonomy located in “families, households, and local communities.”¹⁸⁴ The emerging autonomy of nations in medieval Europe can be located in this conception of the limited sovereignty of the Pope and Holy Roman Emperor.¹⁸⁵ As Professor Berman argues in the context of describing the emergence of historical jurisprudence as a distinct form of normative argument:

[A] nation’s law is to be understood above all as the product of that nation’s history—not merely in the obvious sociological sense that existing institutions are derived from preexisting institutions but also in the philosophical sense that the past history of a nation’s law both has and ought to have a normative significance for its present and future legal development.¹⁸⁶

The gist of this justification ultimately is the identification of a historical community, a “People,” who merely through their existence acquire an entitlement to self-determination under the Charter.¹⁸⁷

183. *Id.* at 179–80. A modern version of the formulation is Emile Durkheim’s concept of mechanical solidarity, which consists of a shared sense of interdependence among individuals due to their similarity. *See* EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 130 (George Simpson trans., 1964). By contrast, under “organic solidarity,” individuals share a sense of interdependence because of their dissimilarities. *See id.* Yet organic solidarity, in melding individuals into groups merely by common interest, may well lead to the erosion of the *conscience collective*, *id.* at 203–04, which is Durkheim’s term for the common system of belief in a society that “has a life of its own”—in other words, the moral law. *Id.* at 79; *But see* MacNeil, *supra* note 84, at 94–98 (contending that individualism would, even with the dissipation of mechanical solidarity, be sufficient to provide a basis for social solidarity because of the common awareness of dependence on technology and capital). Because Durkheim believed that history moved in the direction of the increasing division of labor, “social solidarity tends to become exclusively organic.” DURKHEIM, *supra* at 173. The increased division of labor is driven by dynamic density, under which increased interaction between previously separate groups breaks down homogeneity within these previously separate groups. *Id.* at 257–62. *See generally* ANTHONY GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY: AN ANALYSIS OF THE WRITINGS OF MARX, DURKHEIM AND MAX WEBER* (1971). Durkheim’s methodology thus can be used to make a strong case for the medieval argument from community, which grounds social cohesion on the suppression of individualism.

184. BEER, *supra* note 162, at 180; *see also* Berman, *supra* note 124, at 1677 (explicating Coke’s view that the rights of Parliament were “inherited” by “birthright” and not, as contended by James I, possessed by royal “toleration”).

185. *See* MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 151–62 (1993); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 17–22 (1954).

186. Berman, *supra* note 124, at 1693.

187. *See* U.N. CHARTER art. 1, para. 2 (stating as a purpose of the United Nations “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other measures appropriate to strengthen universal peace.”).

As applied to supranational constitutionalism, the historical community argument seeks to preserve the historical communities found in the constituent entities of the larger polity. Weiler, for example, notes that:

In Europe, the Treaty itself does not precisely define the material limits of Community jurisdiction. But it is clear that, in a system that rejected a "melting pot" ethos and explicitly in the preamble to its constituent instrument affirms the importance of "an ever closer union among the *peoples* of Europe," that saw power being bestowed by the Member State on the Community (with residual power thus retained by the Member States) and consecrated in an international Treaty containing a clause that effectively conditions revision of the treaty on ratification by parliaments of all Member States, the "original" understanding was that the principle of enumeration would be strict and that jurisdictional enlargement (*rationae materiae*) could not be lightly undertaken.¹⁸⁸

Thus, in Weiler's vision of the European Community, the substantive value of preserving community distinctiveness rather than facilitating the emergence of a melting pot undergirded the narrow conception of enumerated powers. This view did not prevail, however in the constitutional history of the Community.¹⁸⁹ Similarly, it appears to have survived only as a minority view in U.S. constitutional jurisprudence.¹⁹⁰

This failure of the argument from community in the U.S. and European Community is partly due to this argument's undemocratic tendencies. It is often suggested that the enlargement or integration of a polity necessarily entails a loss of democracy characterized by majority rule.¹⁹¹ Under conventional democratic theory, "[t]he basic assumption of the democratic political process is that today's minority might in the future either become a majority by convincing those in the present majority to agree with them, or hope to become a majority as a result of slow changes in the social structure."¹⁹² As Weiler notes, a community's boundaries are determined over time by "political continuity, social, cultural, and linguistic affinity, and a shared history."¹⁹³ Such communities are not normally likely to degrade in a political time-frame necessary to perpetuate the reality, or the fiction, that minority status is not permanent. The preservation of historical communities thus works against democracy in the context of supranational governance by undercutting the ideal of a

188. Weiler, *supra* note 99, at 2433-34 (citations omitted).

189. See Bermann, *supra* note 103, at 357. Oddly enough, the form of the hierarchic conception may have survived in the Maastricht amendment to the Community constitutional structure, under which a principle of "subsidiarity" has been introduced. See *id.* at 334 & n.8. The concept of "subsidiarity" finds its modern origins in Pope Pius XI's 1931 encyclical *Quadragesimo Anno*, which argued that "the more faithfully this principle of subsidiarity function is followed and a graded hierarchical order exists among the various associations, the greater also will be both social authority and social efficiency." *Id.* at 339 n.18 (quoting Joseph Komonchak, *Subsidiarity in the Church: The State of the Question*, 48 THE JURIST 298, 299 (1988), quoting in turn Pius XI, *Quadragesimo Anno* § 79 (1931)). However, the term was given an utilitarian coloration of its constitutionalization in the Maastricht Treaty. See Lenaerts, *Subsidiarity and the Environment*, *supra* note 103, at 875-80 (arguing that Community action is lawful as a function simply of "effectiveness").

190. See *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842, 1875 (1995) (Thomas, J., dissenting). Beer believes that this conception lost out early on in the emergence of the United States as a federal republic, for he associates it with the Anti-Federalist opponents of the Federal Constitution, the losing view in the debate over ratification. BEER, *supra* note 162, at 292. The focus on community was, moreover, seen by Madison, not as a good to be sought, but rather as a vice to be transcended. Madison rejected the "spirit of *locality*" which, in his view, under the Articles of Confederation manifested itself in states favoring local interest groups over the interest groups outside of the state. *Id.* at 294.

191. See Weiler, *supra* note 99, at 2471.

192. JUAN J. LINZ, THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, & REEQUILIBRATION 61 (1978).

193. Weiler, *supra* note 99, at 2471.

circulation of temporary governing coalitions.¹⁹⁴ Given the connection Weiler sees between “voice” and “legitimacy,” supranationalism—particularly when based on the argument from community—entails a loss of democracy, which Weiler broadly characterizes as a “Democracy Deficit.”¹⁹⁵

On the other hand, there is no guarantee that decentralization will have pro-democratic effects.¹⁹⁶ As Linz argues, “the principle of nationality—cultural and linguistic nationalism in multinational states, particularly those with a dominant national culture and identity and without clear territorial separation of the different communities—is not likely to lead to stable democracies.”¹⁹⁷ This failure to lead to stability results because autonomy for a region will, at the same time as it turns a minority group of the larger polity into a majority group in the region, turn the members of the national majority group who inhabit the region into a minority group there.¹⁹⁸ Reconstitution of territorial boundaries at different levels of geographic size may well see a process of minority groups leap-frogging each other in successions driven by the effort to become the majority group within the new territorial boundaries; logic supplies no particular endpoint to the process.

Thus, to reconcile the historical community argument with democracy requires (particularly at the context of supranationalism, but probably also at any level of integration) the additional element of some account of how the argument from community will facilitate the emergence of a sense of common interest among groups with initially incompatible interests.¹⁹⁹ According to Professor Beer, the Federalist James Wilson understood—as perhaps James Madison (who believed that rational debate among factions in a federal republic would be enough to secure policy choices advancing the public interest) did not—that democratic “participation would create the social bonds of new communities.”²⁰⁰ Wilson believed that rational deliberation inevitably has attached to it an “affectual quality,” which generates social bonds among participants in a political process.²⁰¹ Thus, Wilsonian Federalist theory supplements the argument from community, which itself is incapable of transcending the Democracy Deficit created by a supranational federation, by creating a social union on “the promise of democratic participation as an instrument for making the nation more of a nation.”²⁰²

194. For an argument that the U.S. constitutional jurisprudence of “equal protection” can, and should, be built around a representation-reinforcing rationale to compensate for the inability of “discrete and insular minorities” to achieve effective voice in a pluralist model of democratic politics, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 116–25 (1980).

195. Weiler, *supra* note 99, at 2472. For an early recognition of the relation between the “democratic dimension or at least some inclusion of non-governmental groups” in constructing a persuasive theory of legal obligation in the international context, see Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 315 (1968).

196. This feature of the argument from community is manifested, for example, in the views recently expressed by George Kennan, who sees “no intrinsic virtue in the melting pot as such.” GEORGE F. KENNAN, *AROUND THE CRAGGED HILL: A PERSONAL AND POLITICAL PHILOSOPHY* 127 (1993). At the same time, Kennan asserts that he saw “no reason to suppose that ‘democracy’ along West European or American lines is necessarily, or even probably, the ultimate fate of humanity.” *Id.* at 64.

197. See LINZ, *supra* note 192, at 62.

198. *Id.*

199. As Weiler observes, the constitutive instruments of the European Community are schizophrenic on this point, simultaneously calling in the Preamble for “an ever closer union among the peoples of Europe” and in the body of the treaty for “closer relations between the States.” Weiler, *supra* note 99, at 2480 n.213 (emphasis supplied by Weiler); but see *id.* at 2433–34 (arguing that even if the EU calls for the “union among the peoples,” it does not go so far as to call for the union of peoples into one people, and thus rejects the melting-pot model).

200. *Id.* at 385.

201. *Id.* at 374.

202. *Id.* at 375. Arguably, the social union that would be formed by democratic politics would need to be mediated by a theory of representation that flows from the argument from liberty rather than the argument from community. Thus, another measure of the dominance of the argument from liberty under the Federal

Put another way, the danger of the argument from community is that in its purest form it can install an anti-democratic constitution at the supranational level unless fundamental differences among the different historical communities comprising the supranational polis wither away or bonds of loyalty emerge that make the differences somehow seem less fundamental.

2. The Argument from Liberty

The argument from liberty, like the argument from utility,²⁰³ sees federalism in terms of its usefulness in achieving a particular result. Unlike the argument from community, however, that objective is not related to the distinct character of the constituent peoples. Rather, federalism fulfills an ideal conception of the individual derived from natural law principles.²⁰⁴ Thus, the argument focuses on the instrumental importance of federalism in the perfection of the individual as being capable of exercising freedom in accordance with community interests.²⁰⁵

Constitution of 1787 is the employment of single-member districts and the Supreme Court's recent rejection of race-based redistricting of such districts. See *Miller v. Johnson*, 115 S.Ct. 2475 (1995). There the Court refused to sanction race-based redistricting, rejecting the argument from community's corporatist assumption that members of racial groups will always share an identity of interest; the Court seems to have relied instead on the argument from liberty's pluralist assumption that minority groups can form coalitions of interest and thus achieve political power, even if members of minority groups themselves are not elected as representatives. *Id.* at 2486; see also *Shaw v. Reno*, 509 U.S. 630 (1993).

The assumptions of the Court's jurisprudence, whether or not they reflect accurately the arguably non-Madisonian dimension of Section 5 of the Fourteenth Amendment and Section 5, the Anti-Dilution provision, of the Voting Rights Act, 42 U.S.C. § 1973c, seem generally consistent with the underlying political philosophy of Madisonian Federalism under which deliberative democracy presumes the impermanence of factional coalitions. Nonetheless, Justice Stevens pointedly observed that the majority's theory of standing, under which whites suffered "representational harms" by virtue of race-based redistricting, was itself based on the "very premise the Court purports to abhor: that voters of a particular race think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 115 S.Ct. 2475 at 2497-98. (Stevens, J., dissenting) (internal quotations omitted); see also Jeff Rosen, *The Color-Blind Court*, NEW REP., July 31, 1995, at 19, 22. Compare also Alan Gibson, *Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the Tenth Amendment*, in 12 HISTORY OF POLITICAL THOUGHT 263 (1991) (arguing, without distinguishing between normal and constitutional politics, that Madison should be interpreted in accordance, neither with the neo-Marxist Beardian interpretation nor the pluralist model, but rather as advocating a theory permitting the construction of a common interest as perceived by disinterested and deliberative representatives) with Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993) (proceeding on the assumption that minority groups who are not a majority in a single-member district will be dominated by the majority and thus arguing, tentatively, for multi-member districts and proportional and semi-proportional representation so as better to reflect voter interests). Guinier responds to the criticism that her views undercut pluralism with the suggestion that proportional representation theory based on group interests is "not necessarily descriptive of an essentialist concept of group identity." *Id.* at 1140 n.14.

203. See *infra* text accompanying notes 212.

204. As Beer writes, the Anti-Federalists argued that "the small polity [was] . . . the forum where republican virtue could best be cultivated." BEER, *supra* note 162, at 180.

205. See Gibson, *supra* note 167, at 572. Gibson recites Diamond's view that the Framers believed: "Preserving decentralized federalism was important because it allowed citizens to conduct many of their own local affairs . . . [which] would help to mitigate the effects of individualism and to foster an enlarged understanding of self-interest among citizens who were enticed into politics only on the premise of economic gain." *Id.* at 572-73. The premise of this argument was a certain view of history and political theory bequeathed by students of classical Greece and Rome. Tradition held that faction was a source of disorder and the probability of faction increased with size of the state. Thus, if a republic became large enough to defend itself it was less likely to retain its republican form of government. Machiavelli's inferences from the history of Rome and the plight of the Italian city-states thus yielded what Beer calls the "dilemma of scale." BEER, *supra* note 162, at 86-90. Montesquieu, according to Beer, recognized this "dilemma" and sought to solve it through a

We can also now see the distinctive features of an argument from community by a comparison with its Madisonian antagonist. Madison accepted the major premise of the Anti-Federalist case that liberty was important but not the minor premise that liberty could best be advanced by a small state theory of government. In effect, Madison rejected the dilemma of scale, under which the hydraulic pressure driving a republic to become larger made its survival as a republic increasingly problematic.²⁰⁶ The Anti-Federalist saw “the basic units of American politics” not “as functioning interests groups, cutting across state lines, but [as] separate polities, the states, each with its unique and cohesive individuality. Having a common life valued for its own sake, each state would be morally and politically self-sufficient.”²⁰⁷ By contrast, Madison saw the basic constituent bloc of politics as the interests of individuals.²⁰⁸ Thus, Madison believed that the extension of scale would serve to multiply interests and compel, through government by discussion, a reasoned exchange on how to advance the common interest.²⁰⁹ Under this conception, Madison favored “pluralistic diversity as a primary condition of government in the public interest.”²¹⁰ As Alan Wolfe has recently noted:

The clash of interest groups produces pluralism, which emphasizes cross-cutting memberships; we all belong to many groups, and liberty is protected by the inability of any one group to win all the time. The clash of identity groups, by contrast, yields corporatism, in which all members of any one group are identical and membership in one group precludes membership in another.²¹¹

Pluralism, under this view, is not an argument from community, but rather an argument from liberty.

3. The Argument from Utility

A final, though no less important, perspective in justifying the autonomy of constituent units in a supranational entity is, ironically, the needs of the larger polity itself. For example, in the case of the European supranationalism, the communitarian values Weiler finds expressed in the Treaty of Rome’s reference to “peoples” of Europe were, as Weiler himself recognizes, eroded over time by a process Weiler refers to as “mutation.”²¹² Instead, an instrumentalist approach was ultimately adopted by the European Court of Justice, under which the Court in effect justified any expansion of Community power on the utilitarian rationale that harmonization of Community law served the purpose of facilitating the fulfillment of the enumerated objective of transforming the Member States

“confederacy” solution in which the right to secede was explicitly acknowledged. *Id.* at 220–24. While the Anti-Federalists accepted Montesquieu’s conclusions, Madison reasoned out a different answer. *Id.* at 237–38.

206. BEER, *supra* note 162, at 255–61.

207. *Id.* at 241.

208. *Id.* at 257–59 (articulating the various senses in which Madison used that term to include the “outcome or product of the individual’s distinctive faculty,” the “passion of attachment to such material and ideal products of individual activity,” and, finally, “interest group” as we now understand that term). Thus, the root of Madison’s analysis is a liberal conception of government as reflecting the rights of individuals, not groups. *Id.* at 262.

209. *Id.* at 270–75.

210. *Id.* at 260.

211. Alan Wolfe, *Liberalism Against Its Enemies—And Its Friends: The Good, the Bad and Gingrich*, NEW REPUBLIC, May 1, 1995, at 35, 39 (reviewing STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY*, and MICHAEL J. PIORE, *BEYOND INDIVIDUALISM: HOW SOCIAL DEMANDS OF THE NEW IDENTITY GROUPS CHALLENGE AMERICAN POLITICAL AND ECONOMIC LIFE*).

212. See Weiler, *supra* note 99, at 2434–35.

into a common market.²¹³ Professor George Bermann thus has argued that “[a] constitution that allows federal authorities to prescribe state policy over purely intrastate trade, on the theory that national disparities may distort patterns of interstate trade, cannot seriously be regarded as ‘enumerating’ the Community’s legislative powers.”²¹⁴

This conception of federalism makes the survival of states a mere means to serve larger ends, a matter simply of organizational architecture, and has very little to do with the preservation of the existence of communities of “peoples” as such or the perfection of individuals. Rather, it views the question of federalism from the perspective of the common goals of the whole population and leaves room for goals or interests of communities which may depart from the maximization of utility for the whole only to the extent activities benefiting such communities are financed by the beneficiaries.²¹⁵ Accordingly, the construction of local governments is simply a means to achieving the end of providing services and arranging taxation in a way that facilitates efficient resource allocation. A priori, this allocation says nothing about the “right” size of states, though it may be based on the principle that size ought to be a function of the maximization of some set of values.²¹⁶ Thus, a purely utilitarian justification for federalism makes it very difficult to account for the retention of any particular set of boundaries over time.²¹⁷

This is not to say that a regime grounded in an argument from community would not also face the same problem.²¹⁸ The difference is that the argument from utility seems to call for a constant reexamination of the boundaries of the constituent units, whereas the argument from community reserves reexamination for those rare circumstances in which the boundaries no longer conform to the existing communities.

213. See generally Lenaerts, *Constitutionalism and Federalism*, *supra* note 103, at 220 (arguing that the Community in effect reserves no power to the Member States); Lenaerts, *Subsidiarity and the Environment*, *supra* note 103, at 893 (arguing that even the new post-Maastricht principle of subsidiarity is not an allocation of powers as between the Community and Member States but rather a “political principle, a sort of rule of reason,” guiding the exercise of powers by Community institutions); Bermann, *supra* note 103, at 357.

214. Bermann, *supra* note 103, at 356 n.93 (noting presciently that an “analogous observation could be, and has been, made about Congress’ exercise of prescriptive jurisdiction under the Commerce Clause.”). See *United States v. Lopez*, 115 S.Ct. 1624 (1995) (requiring that intra-state commerce have a “substantial effect” on interstate commerce and invalidating a federal statute banning gun possession near schools).

215. “Fiscal federalism,” for example, suggests that payment for public goods should be made by the populations that benefit from them. See, e.g., ROBERT MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN POLITICAL ECONOMY* 61–89 (1959); BEER, *supra* note 162, at 181. Under this view, a “public good” is a good that must be produced by the government because the producer would not produce at the socially optimal level, given its inability to require other beneficiaries, free riders, to pay for the value they derive from use of the public good. The point is simply to assure that the payment system employed by the government best identifies the beneficiaries of the good. See *id.* at 179–80. Madison recognized this potential asymmetry of interests between the whole and its parts, but as a prudential argument for decentralization by the national government rather than as an underlying justification for the existence of states. See BEER, *supra* note 162, at 293.

216. This methodology also has predictive, as well as normative, implications. A recent study, for example, argues that the primary benefit of size is the public goods that become available from increasing returns to scale. ALBERTO ALESINA & ENRICO SPOLAORE, *ON THE NUMBER AND SIZE OF NATIONS* (National Bureau of Economic Research Working Paper No. 5050, 1995). This is only true up to a point since, as suggested by fiscal federalism, every state will reach a size at which it will be too large to distribute public goods efficiently. If, however, public goods, such as a larger market, become available without state consolidation, then the optimal size of the state should decrease. The study thus concludes that “the benefit of country size on economic performance should decrease with the increase of economic integration and removal of trade barriers.” *Id.* at 23. The study thus notes that its implications for the states of the EC and Canada are compelling. *Id.* at 1, 22.

217. See BEER, *supra* note 162, at 294.

218. See KENNAN, *supra* note 196, at 149–50.

E. *The Federalist Conception of the U.N. Charter*

Arguably, the U.N. Charter's conception, in retaining the distinct role of "peoples," draws from the argument from community. Its seems fair to say that, unlike the European Union however, the Charter has thus far retained a greater measure of that character, given the durability of hierarchical distribution of power in the international community (including the survival of the veto, the persistence of minority community rights,²¹⁹ and the exclusionary tendencies that have also seemingly recrudesced in the revival of nationalism in the post-Cold War world). On the other hand, the enlargement of democracy under a liberal individualist conception, particularly as expressed in universal human rights norms, suggests that the argument from liberty plays a major role, particularly as it is implemented through the revival of regional collective security efforts through procedures that tend to enhance reasoned, international democracy as well.²²⁰ Finally, the Charter seems to point to circumstances under which the utilitarian conception of federalism plays an important part.²²¹ An interpretation of Article 2(7) as the textual basis for decentralizing tendencies in the U.N. Charter must take into account, then, the arguments from community, liberty, and utility, if it is to accurately account for the change in meaning of the U.N. Charter in the post-Cold War world and to describe the Charter as it is, rather than as what we wish it may become.²²²

VI. CONSTITUTIONAL PROCESS IN SUPRANATIONAL FEDERALISM

This Article will now examine the U.N. Charter's meaning on the assumption it is the constitutive instrument of a supranational community. The question, then, is explaining the radical discontinuity from the Charter's original design without the adoption of a formal amendment in accordance with the procedures set forth in the Charter.²²³ How can this

219. See *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/810, at 71, art. 27 ¶ 1 (1948) ("Everyone has the right freely to participate in the cultural life of the community . . ."); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. 27, 999 U.N.T.S. 171 (entered into force Mar. 23, 1967) ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.") [hereinafter CCPR].

220. That said, this Article will argue that the argument from community's corporatist tendencies remain a central, and ill-liberal, feature of the emerging supranational constitution. See *infra* text accompanying notes 280-96.

221. See U.N. CHARTER art. 50.

222. See, e.g., Slaughter, *The Liberal Agenda for Peace*, *supra* note 62 at 410-13 (proposing an amendment to Article 2(7) based on liberal individualist principles).

223. The Charter, like Article V of the U.S. Constitution, prescribes two different routes for formal amendments. Article 108 provides:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

U.N. CHARTER art. 108.

Article 109(1) provides for the holding of a "General Conference" by "a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council." Article 109(2) further provides that:

Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

change be reconciled with constitutionalism? The argument advanced here is that constitutional change at the supranational level can occur without the adoption of a specific written amendment to the text of the written constitution.

Because the legitimacy of change will always be the final measure, we need to distinguish between at least two possible approaches for describing constitutional change: continuous and discontinuous change. Continuous constitutional change should not be confused with normal treaty interpretation.²²⁴ On the other hand, Weiler's account of constitutional mutation is one of continuous, evolutionary change responding to systemic pressures of exit and voice drawn from the Hirshman model.²²⁵ His account of constitutional change is very much, therefore, in the common law tradition, which embodies a hierarchical conception of reason in which authoritative judgments are expressed through the consensus of a learned community.²²⁶ Weiler's "mutation" theory of supranational constitutional process thus implicitly draws on this gradualist conception of change.

The account of constitutional change employed in this Article draws instead from a different pattern articulated by Professor Ackerman in which, in contrast to common-law change, a discontinuity is widely perceived and is understood by the relevant community as a fundamental departure from existing patterns of governance.²²⁷ This Article's argument draws on the thesis Professor Ackerman advances in relation to the U.S. Constitution under the neo-federalist theory underlying the Constitution, in which new values debated at critical moments through electoral contests in which the institutions of government challenged the received constitutional traditions of their times and amended the U.S. Constitution without employing the procedures for a formal amendment specified in Article V.²²⁸ In a similar process, a constitutional moment arose for the U.N. at the end of the Cold

U.N. CHARTER, art. 109.

224. For example, Weiler eschews treating the change in meaning without formal amendment as variation within the permitted range of original meaning and, thus, does not rely on the conventional tools of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties and customary international law, which would describe a process of subsequent practice filling gaps in meaning left by the text. *See* Weiler, *supra* note 99, at 2434–35; *cf.* Smith, *supra* note 82, at 1577–1583 (claiming that traditional treaty rules are helpful, but not completely capable of determining the extent of obligations under modern international agreements).

225. *See* Weiler, *supra* note 99, at 2464–65.

226. *See* Berman, *supra* note 124, at 1718 (describing Hale's view of the common law's "artificial reason" as "the combination of reason inherent in law itself and the reasoning of experienced students and learned practitioners of law"); *But see id.* at 1723 n.200 (arguing that the current theory of *stare decisis* has more to do with Enlightenment concepts of predictability and legislative supremacy than with historicist, and thus gradualist, common law conceptions of authority and change); *see also* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 17–18 (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*] (discussing Burkean or common law approaches to constitutional interpretation under which the "only 'theory' with any real value is found in the opinions of judges responding to the facts of particular cases"). Weiler himself recognizes the anti-democratic nature of "mutation." *See* Weiler, *supra* note 99, at 2452–53.

227. *See* Ackerman, *Constitutional Politics*, *supra* note 159, at 472–78 (critiquing so-called Burkean constitutional theories as artificially gradualist and unwilling to acknowledge the possibility of discontinuous change); *see also* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 907–09 (1995) (applying this methodology to constitutional issues relating to external sovereignty; that is, whether congressional-executive agreements could supplant Article II treaties). *But see* Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (taking Ackerman to task for misconstruing small rips in the constitutional fabric as major holes requiring wholesale reconstruction but, unlike Ackerman, failing to provide a political theory that would explain constitutional politics).

228. *See generally* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) [hereinafter Ackerman, *The Storrs Lectures*] (the earliest statement of Ackerman's neo-Madison, or Dualist, theory of constitutional politics; constructing representational theories under which the branches of government ordinarily "represent" the People only in a semiotic sense but at critical moments can represent the People in a truer, mimetic sense and, therefore, speak with a greater claim of democratic legitimacy).

War, in which the Secretary-General proposed, and the organs of the U.N. (together with its "peoples") approved, amendments to the Charter without employing the procedures specified for a formal amendment.

A. *Informal Constitutional Change Through Constitutional Politics*

The Dualist theory of constitutional law presupposes a theory of politics under which the citizen is usually motivated by private interests. Only at extraordinary moments in history are constitutional politics at stake in the decision-making of relevant institutions, which at these moments respond to expressions of popular will of a constitutional nature.²²⁹ In this model, institutions articulate constitutional claims because the public they represent itself engages in constitutional politics.²³⁰ Under this scheme, it is argued that the U.S. Constitution is thus amended by the People themselves engaging in constitutional politics in an election that represents a constitutional moment constituting an unwritten amendment to the written constitution.²³¹ More specifically, a proposal for a constitutional "amendment" is made by one of the potential spokesmen for "the People," namely one of the branches of the federal government, and the proposal is ratified by "the People" themselves in a constitutionalized election.²³²

There are obvious limits to the application of the Dualist theory of constitutional politics to the problem of understanding constitutional change in the United Nations. Dualism, arguably, is founded in a specific historical and cultural context, suggesting the receptivity of the relevant community to constitutional politics of a quasi-revolutionary character.²³³ Yet, this new politics seemed especially adapted to the emerging commercial societies of the modern world.²³⁴ Thus, the Federalists' political ideas had, notwithstanding their own misunderstanding of the conservative nature of their project,²³⁵ the potential for broader, perhaps even universal, application.²³⁶

229. See ACKERMAN, *WE THE PEOPLE*, *supra* note 226, at 6–7. Ackerman relies on the success of the Civil War amendments to the U.S. Constitution, notwithstanding their ratification without adhering to the formal procedures of Article V, to argue that the term "convention" in Article V of the U.S. Constitution encompasses the irregular processing of the Civil War amendment and, by extension, the even more irregularly processed amendment of the New Deal. *Id.* at 44–47, 81–82; see also Ackerman, *Constitutional Politics*, *supra* note 159 at 490–515.

230. See Ackerman, *The Storrs Lectures*, *supra* note 228, at 1056–69; Ackerman, *Constitutional Politics*, *supra* note 159; see also Amar, *supra* note 161, at 1459 n.147, 1464 n.166 (questioning in passing the wisdom of the Framers' political theory of "transubstantiating" the "People into conventions," yet concurring in Ackerman's main thesis).

231. See, for an elaboration, ACKERMAN, *WE THE PEOPLE*, *supra* note 226, at 230–94.

232. *Id.* at 280–94.

233. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–87*, at 306–43 (1969) [hereinafter WOOD, *THE CREATION*] (detailing the emergence of "conventions" in pre-revolutionary America and discussing their significance in developing a specifically American conception of higher law making). Wood argues that American theorists relocated sovereignty in the people-at-large, "a transference that was comprehensible only because of the peculiar experience of American politics." *Id.* at 599.

234. See DIAMOND, *supra* note 167, at 351; WOOD, *THE CREATION*, *supra* note 233, at 615 ("[T]he Federalists' creation could be, and eventually was, easily adopted and expanded by others with quite different interests and aims at stake, indeed, contributing in time to the destruction of the very social world they had sought to maintain."). For an elaboration of the process Wood alludes to in his early work, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

235. See WOOD, *THE CREATION*, *supra* note 233, at 562. Wood explains that:

By using the most popular and democratic rhetoric available to explain and justify their aristocratic system, the Federalists helped to foreclose the development of an American intellectual tradition in which differing ideas of politics would be intimately and genuinely related to different social

If we can accept the possibility of constitutional politics in supranational society, it would not appear to be a fatal objection, particularly in international law, that an amendment in the international constitutional regime could take place without a formal amendment of the constitutional text. It has widely been observed that informal processes of normative creation and change play a central role in international law.²³⁷ This observation is due in part to the limits of treaty law in adapting to change in the international system.²³⁸ It is also recognized that *jus cogens*, perhaps functioning as a kind of constitutional norm, may supersede lower-order norms, such as treaties and custom.²³⁹ The explicitly natural law character of *jus cogens* deprives it, however, of legitimacy in the sense that a constitutional norm produced through some kind of representational process—whether it be representation of states, peoples, or individuals.²⁴⁰ Also, while the U.N. Charter defines itself as a supernorm in relation to treaties,²⁴¹ it is noticeably silent in respect to subsequent customary law and *jus cogens*.²⁴²

Therefore, the mere fact that the Charter prescribes formal processes for amendment and revision²⁴³ does not exclude the possibility of informal, nontextual processes like supervening custom or *jus cogens*. Notably, Article 109 permits Charter “alteration” through the holding of a “General Conference.”²⁴⁴ Thus, just as the term “convention” in Article V functions as the textual source for the informal amendment process described by

interests. In other words, the Federalists . . . contributed to the creation of that encompassing liberal tradition which has mitigated and often obscured the real social antagonisms of American politics.

Id.

236. For a critique of Wood’s so-called Beardian—that is, neo-Marxist—theory of American Federalism, see ACKERMAN, *WE THE PEOPLE*, *supra* note 226, at 212–21. Ackerman contrasts Wood’s thesis with Hannah Arendt’s view that the Framers’ succeeded in their revolutionary project; that is, they created a new regime that revived the classical conception of citizenship in a participatory politics that could serve as a model for revolution throughout the world. See *id.* at 204–12, 220; compare HANNAH ARENDT, *ON REVOLUTION* (1963) with CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

237. See, e.g., Schachter, *Towards a Theory of International Obligation*, *supra* note 195, at 302 (1968) (“The peculiar features of contemporary international society have generated considerable normative activity without at the same time involving commensurate use of the formal procedures for international ‘legislation’ and adjudication.”).

238. See, e.g., Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781 (1994); but see Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 835–41 (1990) (arguing that treaties, because of greater popular involvement, and thus greater domestic legitimacy under most of the world’s constitutional regimes, are more reliable sources of international law).

239. See Vienna Convention, *supra* note 49, art. 53 (defining *jus cogens* and stating any treaty provision inconsistent with an existing *jus cogens* norm is ineffective); see also *id.* arts. 64, 71 (terminating any treaty provision inconsistent with a subsequently emerging *jus cogens* norms and preserving only those executed effects of the terminated treaty not inconsistent with the new *jus cogens*).

240. For variants of the natural law dimension to *jus cogens*, none of which appeals to any form of legitimation based on a political theory of representation, see EDWARD MCWHINNEY, *UNITED NATIONS LAW MAKING* 73–75 (1984) (locating the origins of the idea in natural law influences in Roman and civil law legal systems); see also Louis Henkin, *General Course*, 216 RECUEIL DES COURS 52 (1989-IV) (describing the concept as “inherent in Statehood in a State system”); see also OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 30–31 (1991) (describing as “rules of necessity” which are “authoritative by virtue of the inherent necessities of a pluralist society”).

241. See U.N. CHARTER art. 103 (“In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

242. Anthony D’Amato, *Trashing Customary International Law*, in *INTERNATIONAL LAW ANTHOLOGY*, *supra* note 134, at 84, 86. D’Amato argues that Article 2(4) of the Charter’s strict rule against the use of force has been superseded by subsequent custom and criticizing the World Court for failing to perceive this transformation in the Nicaragua Case, where the Court regarded customary law as identical to Charter norms).

243. See U.N. CHARTER arts. 108, 109.

244. U.N. CHARTER art. 109, para. 2 (requiring subsequent ratification by states in accordance with their constitutional processes).

Ackerman,²⁴⁵ so too the term "General Conference" may well be the textual source for the informal amendment procedure for the international constitution described below.²⁴⁶ Another interpretive approach—suggested by Amar's argument that Article V should be read as one possible, but by no means the only, procedure for amending the Constitution—is to interpret Articles 108 and 109 of the Charter so as not to foreclose amendment by other procedures.²⁴⁷ And, even if one is not persuaded that the U.N. Charter itself was not a constitutional document (but is better analyzed exclusively as a treaty),²⁴⁸ it is still possible to argue that the constitutional edifice, of which the initial Charter is simply the infrastructure, has been completed in the last years with the addition of the superstructure realizing a constitutional integration of communities.²⁴⁹

Another, more significant, caveat in applying the Dualist thesis is that its legitimacy as an account of constitutional law depends on the development of some kind of constitutional politics. But are we talking about individuals, peoples or states as actors, or states as proxies for peoples? We are back to the problem of identifying the relevant unit of analysis in the international context, a problem that so bedevils discourse in morals and its relation

245. See ACKERMAN, *WE THE PEOPLE*, *supra* note 226.

246. The General Conference method was, after all, the product of a U.S. proposal to address the concern of many states that the veto would become a permanent feature of the Organization. See GOODRICH ET AL., *supra* note 38, at 644.

247. See Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1055 (1988). Amar argues that this interpretive methodology is derivable from the underlying political philosophy and constitutional theory informing the Founding, that is, popular sovereignty, since the supremacy of the People acting constitutionally requires that the People reserve to themselves the power to act in a manner they had not previously contemplated. Thus, his "external theory" of constitutional process is consistent with his "internal" theory of constitutional interpretation. *Id.* at 1072 & n.103 (conceding with remarkable candor, however, that his external theory may well drive his internal theory).

248. From a domestic law standpoint, one reason to be skeptical of a non-treaty approach to Charter interpretation to validate the informal amendment suggested in this Article is the absence of Senate advice and consent. See U.S. CONST. art. II, § 2 (the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."). The traditionalist focus on state sovereignty probably would see any U.S. constitutional infirmity as a dispositive argument against the interpretive theory advanced here. See, e.g., Ernest S. Easterly III, *The Rule of Law and the New World Order*, 22 S.U. L. REV. 161, 179 (making just such an argument against any interpretation of the CSCE Copenhagen and Moscow Documents as international "constitutions" or any other kind of legally binding international instrument, even though the executive branch's power to make customary law and adhere to General Assembly resolutions understood to be declaratory of such law seems well-settled).

One possible defense might be that power to amend the Charter informally was included within the treaty to which the Senate gave its advice and consent to ratification. Potential U.S. Constitutional infirmities would seem even less relevant if the U.N. Charter were treated as a supranational constitution, particularly since the Senate's advice and consent to the Charter may itself have had constitutional significance in the U.S. See Ackerman & Golove, *supra* note 227, at 907–13 (arguing that the adoption of the Charter was part of a constitutional moment in the U.S. under which the Senate surrendered exclusive power to approve constitutional treaties). But even if amendments were not part of the treaty as it was submitted to the Senate, this would not affect the international validity of the interpretation advanced here under the law of treaties. Cf. Vienna Convention, *supra* note 49, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). *A fortiori*, a state could not invoke a provision of its law for failure to comply with a higher-order commitment in the supranational constitution.

249. See Kay, *supra* note 175, at 115 (employing this metaphor to describe the movement of Canada from a "preconstitutional" regime to a possibly constitutional regime in the 1980s). Specifically, Kay suggests that the Accord of November 1981, to which all of Canada's provinces less Quebec assented, was arguably legitimate, notwithstanding Canada's formal legal status as a Confederation of Provinces united under the British North America Act of 1867 and the Statute of Westminster of 1931, because of the intense Quebecois involvement in the drafting and ratification process. *Id.* at 150–56. Like Kay, I believe that an account of emergent constitutionalism is ultimately a narrative of one possible future; and, just as Kay believes the verdict of history is not yet in for the Canadian experiment in the transformation of confederalism into a more unitary form, *id.* at 163, history must render its verdict too on the emergence of supranational federalism.

to international law.²⁵⁰ The existence of an international politics having the depth and breadth necessary to reflect a considered judgment of the relevant international communities—states, peoples, and persons—must ultimately be an empirical question. In the theory of legal obligation, the most serious students of legitimacy have ultimately recognized that an empirical demonstration is “sufficient, if contingent, proof of the thing believed.”²⁵¹

A provisional empirical demonstration is suggested in the conclusions of serious scholars and in the massive international discussion of the recent work of the Secretariat and the other organs of the United Nations. Some scholars now seem to consider it axiomatic that subnational and transnational actors play a significant role in international politics.²⁵² Others have even proclaimed the existence of a new “world law” founded on a transnational community or set of communities,²⁵³ a fact whose existence “has had a harder time penetrating legal scholarship or the curriculum of our law schools.”²⁵⁴ Nonetheless, this article will only scratch the surface of the empirical demonstration that would need to be undertaken to substantiate fully its thesis.²⁵⁵

250. See *supra* text accompanying notes 129–30.

251. See FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 69, at 188; see also Schachter, *Towards a Theory of International Obligation*, *supra* note 195, at 322 (describing the question of legal obligation ultimately as “a question of empirical fact,” in the sense that “our experience provides enough evidence to indicate that divergent systems and beliefs exhibit concordances on a wide array of international norms”). Schachter adds: “We have ample proof that mankind shares common characteristics and needs and its efforts to satisfy those needs provides a realistic basis for an international normative structure.” *Id.*

252. See, e.g., Slaughter, *The Liberal Agenda for Peace*, *supra* note 62, at 401 (“[I]nternational organizations can have a direct impact on the development of civil society in a particular State, . . . [and] domestic interest groups may form transnational coalitions to increase their domestic weight”). Slaughter posits that the existence of “transnational ‘epistemic communities’ of technical and scientific experts, communities that can themselves have a transnational impact on governmental policy-making.” *Id.* at 410; see also Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. Q. 45, 46 (tying the legitimacy of inter-governmental institutions to the degree to which they permit non-governmental participation).

253. See Berman, *supra* note 26, at 1621 (stating “that the world has entered a new era of global interdependence, that all inhabitants of the Planet Earth share a common destiny, is a historical fact, a political fact, an economic fact, a sociological fact, that has finally penetrated the consciousness of most of the earth’s inhabitants”). One manifestation of this new world community is, in addition to the emergent public law described in this Article, the rediscovery of the *lex mercatoria* in private international law as a function of the emergence of a transnational international business community. See *id.*

254. *Id.*

255. The international response to the Secretary-General’s *Agenda for Peace*, see *supra* note 15, has been favorable. E.g., Barbara McDougall, *New World Order: Instability Seemed to Catch Many off Guard*, CALGARY HERALD, Jan. 29, 1993, at A5 (Canada making significant contributions to *Agenda for Peace*, “on which the future of the United Nations will be built”); *Government and Liberal Democratic Party Leaders Are Embroiled in a Debate*, DAILY YOMIURI, Feb. 5, 1993, at 3 (Foreign Minister Michio Watanabe highly praised *Agenda for Peace*); Sue Fishkoff, *UN General Assembly President Asks Israel’s Support for “Peace Agenda,”* JERUSALEM POST, Nov. 1, 1992 (U.N. ambassador Gad Ya’acobi, and Foreign Minister Shimon Peres reiterated their support for *Agenda for Peace*); *Netherlands Becomes First Nation to Contribute Military Units to Standby System Proposed by Secretary-General for UN Peace-keeping Operations*, FED. NEWS SERVICE, June 23, 1994 (responding to *Agenda for Peace*, Netherlands notifies Secretary-General that military units at U.N.’s disposal); Brian Lenihan, *Two Crucial Decades to Achieve Peace Goal*, IRISH TIMES, Nov. 6, 1993, at 10 (proclaiming it to be Ireland’s “manifest duty” to reach the goal referred to in *Agenda for Peace*). But see *United Nations: Developing Countries Hit Out at Security Council*, INTER PRESS SERVICE, Oct. 14, 1992 (developing countries fearful that *Agenda for Peace* will authorize U.N. to “intervene in conflicts without the consent of the parties involved”); *Morocco Stresses Interests of Developing World*, XINHAU GENERAL OVERSEAS NEWS SERVICE, Sept. 27, 1993, Item. No. 0927016 (Moroccan senior official claiming that certain aspects of *Agenda for Peace* may be dangerous and damaging); and *United Nations: Developing Countries Hit Out at Security Council*, *supra* (China charging that the “Security Council is being transformed into an ‘instrument of the foreign policy of the hegemonic powers.’”).

This caveat aside, the Dualist theory has explanatory power for discontinuous change, particularly because it lays bare the problem of synthesizing transformative amendments with the achievements of earlier constitutional moments. Because of the imprecision and informality of high constitutional politics and our inability to locate it in a single text, there must be an ongoing process in interpreting the new constitutional meaning. This ongoing interpretation can include transformative decisions by courts,²⁵⁶ key legislative enactments that signal a revised understanding of constitutional possibilities,²⁵⁷ and ultimately, the enactment of constitutional superstatutes which establish a new framework for dealing with problems of normal politics.²⁵⁸ Synthesis, then, takes time. It is not surprising that all the implications of the constitutional sea change at the U.N. have not yet been internalized.

These links can be made in terms of Article 2(7); for if, as suggested, a supranational constitution has emerged around the U.N. Charter as its textual source, the features of that constitution should be tied to the text's specific provisions. Accordingly, Article 2(7) would be the locus of meaning expressing the decentralizing tendencies or values of the U.N. Charter, and its transformation will have implications for related provisions of the Charter as well as for provisions that previously seemed only slightly, if at all, connected to the concept of domestic jurisdiction. It is in this light that this Article will discuss the Secretary-General's *Agenda for Peace*²⁵⁹ and the process of codification of new norms it seemed to contemplate.²⁶⁰

B. *A Proposed Amendment to the U.N. Charter*

It is hard to pinpoint any precise moment of constitutional change for the United Nations. But it is reasonable to point to the meeting of the Security Council at the Head of State or Head of Government level as a turning point.²⁶¹ The meeting was held in response to fundamental changes in world politics: the dissolution of the former Soviet Union; the reunification of Germany; the decision of the European Community in the Treaty of

256. Ackerman, for example, suggests that the difference between the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), and *Lochner v. New York*, 198 U.S. 45 (1905), is not that one was right and the other wrong. Rather, it was the difference between a particularized application of the new constitutional meaning injected by the Civil War amendment—thus, the white butchers had no claim because the Civil War amendments were intended solely to redress black inequality—and a fully transformative synthesis by a later generation. The early republic's strong version of Federalism was rejected in the constitutional struggles following the Civil War; thus, it could no longer perform the function of preserving individual liberty. The next generation synthesized the amendments to preserve the Constitution's commitment to liberty by discovering individual rights in the Due Process Clause of the Fourteenth Amendment and undertaking a course of judicial intervention to enforce it against the states. ACKERMAN, *WE THE PEOPLE*, *supra* note 226, at 95–102, *cf.* Kuhn, *supra* note 93, at 166–70 (describing paradigm change as a civil war within a community of interpreters).

257. See, e.g., Ackerman & Golove, *supra* note 227, at 912 (citing the enactment of the National Labor Relations Act as the product of a constitutional moment in the 1932 election, and the Bretton Woods Agreements as congressional-executive agreements, rather than constitutional treaties, as the product of a constitutional moment in the 1944 election).

258. See *id.* at 915; see also ACKERMAN, *WE THE PEOPLE*, *supra* note 226, at 107.

259. See *AGENDA FOR PEACE*, *supra* note 15.

260. *AGENDA FOR PEACE*, *supra* note 15, ¶ 5 (alluding to the scheduled U.N. Conferences on Environment and Development, which had met the previous spring, and the conferences to be held on Human Rights during 1993, Population and Development in 1994, and Women in 1995). In his supplement to the *Agenda for Peace*, the Secretary-General may have signalled a recognition that perhaps even the “forthcoming conference of the parties to the Non-Proliferation Treaty” was equally important to the synthesis of constitutional change by the United Nations, notwithstanding that the conference was being held outside the technical ambit of the U.N. SUPPLEMENT TO *AGENDA FOR PEACE*, *supra* note 76, ¶ 59.

261. The process recalls the meeting of the victorious powers after World War II at Potsdam, or the conferences following the first World War at Versailles and after the Napoleonic Wars at Vienna. See generally, KISSINGER, *DIPLOMACY*, *supra* note 24.

Maastricht to pursue an enhanced form of supranational government; and the end, for all intents and purposes, of Cold War bipolarity with the demise of the Soviet veto at the Security Council.²⁶² All things became possible. So, the Security Council asked the Secretary-General to study the situation and prepare proposals for, in effect, amendments to the U.N. Charter.²⁶³ Indeed, it would be hard to construe major portions of the *Agenda for Peace* as anything but proposals for the transformation of the received understanding of the U.N. Charter.

In the *Agenda for Peace*, the Secretary-General recognized “the importance and indispensability of the sovereign State as the fundamental entity of the international community,”²⁶⁴ but added that “[t]he time of absolute and exclusive sovereignty [of the state], however, has passed; its theory was never matched by reality.”²⁶⁵ Accordingly, he noted that “a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter—a United Nations capable” of fulfilling its purposes.²⁶⁶

In looking to the “convictions of nations” rather than states, the Secretary-General made clear that he regarded his constituency for fashioning proposals as much broader than the community of states. He noted that his report drew “upon ideas and proposals transmitted to [him] by Governments, regional agencies, non-governmental organizations, and institutions and individuals from many countries.”²⁶⁷ From this broader base of personal authority, then, the Secretary-General’s next rhetorical move was to articulate a new conception of international politics that would justify the transformation of the powers of the Security Council, a vision and set of proposals that he would later claim had received general support “in the General Assembly, in the Security Council and in Member States’ parliaments.”²⁶⁸

VII. THE NEW SUPRANATIONAL FEDERALISM

The principle underlying the Secretary-General’s proposal for “balancing”²⁶⁹ the demands of territorial integrity and self-determination remains unclear. In calling for supranationalism, has he employed an argument from community, liberty, or utility to justify limits on the exercise of power by the center under the supranational constitution? If the question in a federal constitution is: Why have states?, the question for a supranational constitution in which a special value is placed on the integrity of minority communities

262. See AGENDA FOR PEACE, *supra* note 15, ¶ 15 (“With the end of the cold war there have been no such vetoes since 31 May 1990.”).

263. Strictly speaking, the Security Council asked only for an “analysis and recommendations on ways of strengthening and making more efficient *within the framework and provisions of the Charter* and capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping.” AGENDA FOR PEACE, *supra* note 15, ¶ 1 (quoting Statement by the President of the Security Council, [at 3] U.N. Doc. S/23500 (1992)). Admittedly, no formal amendments were explicitly requested by the Council or suggested by the Secretary-General. Yet, the Philadelphia Convention too has been accused of exceeding its authority in proposing not amendments to the Articles of Confederation but a whole new Federal Constitution. See THE FEDERALIST NO. 40, at 252, 254 (James Madison) (acknowledging illegality of proposal but seeking to justify it on its merits); see also Kay, *supra* note 175, at 124–36 (demonstrating illegality of ratification under Articles of Confederation, art. XIII, which provided for amendments only by unanimous consent); but see Amar, *supra* note 247, at 1047–54 (viewing the Articles of Confederation as a treaty which lapsed because of state violations).

264. See AGENDA FOR PEACE, *supra* note 15, ¶ 10.

265. *Id.* ¶ 17.

266. *Id.* ¶ 3.

267. *Id.* ¶ 4.

268. See SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 3.

269. AGENDA FOR PEACE, *supra* note 15, ¶ 19.

then becomes: Why preserve the integrity of minority groups within states and, if that becomes impossible, should their secession be facilitated?

Briefly, the argument advanced in this part of the Article is that the new U.N. Charter's central organizing principle is an amendment that draws primarily from the argument from community, but which also has implications for Charter interpretation that can be understood in terms of the arguments from liberty and utility. The argument from community's manifestation in an expanded right to self-determination, given the amendment of the Charter to demand self-government and permit community action to assure its success, extends the core meaning of Article 2(7) of the original Charter to new circumstances.²⁷⁰ The argument from liberty is expressed in the decentralization of community enforcement under the Security Council's expanded use of its powers to police international peace and security in the post-Cold War environment and the use of those powers to assure external and internal self-determination.²⁷¹ The argument from utility generated pressure for the costs of community action to be redistributed through the activation of Article 50 of the Charter, under which states would have a right to compensation from the international community for the costs of enforcement measures that exceed their fair shares.²⁷²

A. *The Argument from Community in the Federalist Supranational Constitution: Reconceiving State Sovereignty*

This new politics envisioned by the Secretary-General is required by "a time of global transition marked by uniquely contradictory trends."²⁷³ On one hand, "[n]ational boundaries are blurred by advanced communications and global commerce, and by the decisions of States to yield some sovereign prerogatives to larger, common political associations."²⁷⁴ On the other, "fierce new assertions of nationalism and sovereignty spring up, and the cohesion of States is threatened by brutal ethnic, religious, social, cultural or

270. See *infra* Part VII-A text accompanying notes 273–302.

271. See *infra* Part VII-B text accompanying notes 302–445.

272. See *infra* Part VII-C text accompanying notes 446–68.

273. AGENDA FOR PEACE, *supra* note 15, ¶ 11.

274. *Id.* As Oscar Schachter observes:

The contradictory tendencies—micro-nationalism and interdependence—seem paradoxical, but they may well be casually related. Globalization and new external structures of authority can be perceived as diminishing democratic controls. We see this even in Western Europe where integration has gone farthest. Many people are made uneasy by a sense of remote anonymous authority controlling their lives, whether through supra-national organizations, multinational corporations, or the influx of foreigners. One response is a demand for more local autonomy and self-rule by sub-national groups. Micro-nationalism then contagiously flourishes, sustained often by legacies of historic injustices and violence.

Oscar Schachter, *Micronationalism and Secession*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 179, 181 (Rudolf Bernhardt ed. 1995) [hereinafter Schachter, *Micronationalism and Secession*]

To address these "contradictory" tendencies, one could look to existing legal texts and principles for an argument for local autonomy. Richard Bilder, for example, insightfully argues for a reconstruction of Article 2(7), although his formulation could be construed to draw implicitly from the argument from community to favor a corporatist, rather than pluralist, federalism. See Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CANADA-U.S. L.J. 9 (1994). Bilder suggests that a current defense of the concept of sovereignty might be framed in terms of the protection of a "zone of autonomy" as "defined by different communities," which "seems embodied, for example, not only in our democratic tradition of personal liberty, but also in the structure of our American and Canadian federal systems, and, at the international level, in the concept of domestic jurisdiction entrenched in Article 2(7) of the U.N. Charter." *Id.* at 17.

linguistic strife.”²⁷⁵ In this context, the Secretary-General perceived as “a global phenomenon” that “[a]uthoritarian regimes have given way to more democratic forces and responsive Governments.”²⁷⁶ He observed: “One requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic.”²⁷⁷ Accordingly, the Secretary-General concluded that:

sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead. Respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States. Our constant duty should be to maintain the integrity of each while finding a balanced design for all.²⁷⁸

The means to achieve these ends lay in the enhanced role of the U.N. Organization, which the Secretary-General believed would “emerge as greater than the sum of its parts” through “a full and open interplay between all [of its] institutions and elements.”²⁷⁹

1. A New Law of Self-Determination

The Secretary-General’s proposals must be seen against the received law of the Charter. Only then can the revolutionary nature of his views be grasped. The critical feature is the expansion of the doctrine of “self-determination of peoples” beyond its normal bounds. The clearest case for self-determination was, of course, decolonization.²⁸⁰

275. AGENDA FOR PEACE, *supra* note 15, ¶ 11.

276. *Id.* ¶ 9; see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992) [hereinafter Franck, *The Emerging Right to Democratic Governance*] (“Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states.”).

277. AGENDA FOR PEACE, *supra* note 15, ¶ 18. Thus, the Secretary-General pointed to the special significance of the Declaration on the Rights of Minorities, then soon to be before the General Assembly, which, “together with the increasingly effective machinery of the United Nations dealing with human rights,” would “enhance the situation of minorities as well as the stability of States.” *Id.* at ¶ 19. See *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 135, U.N. GAOR, 47th Sess., Supp. No. 49(1), at 210, U.N. Doc. A/47/49(1) (1992) [hereinafter *Declaration on Minorities*]; see also *Report of the Conference on Security and Cooperation in Europe (CSCE) Meeting of Experts on National Minorities*, July 19, 1991, reprinted in 30 I.L.M. 1692 (1991).

278. AGENDA FOR PEACE, *supra* note 15, ¶ 19.

279. *Id.* ¶ 86.

280. See, e.g., G.A. Res. 1514, *supra* note 60, pmbl. para. 12 (proclaiming the “necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”). The Resolution asserts, in this context, that “[a]ll peoples have the right to self-determination.” *Id.* para. 2. See also Continued Presence of South Africa in Namibia, *supra* note 41, at 31 (opining that the recent history of decolonization left little doubt that “the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned”); Western Sahara, 1975 I.C.J. 12 (Oct. 16), at 32 (stating that G.A. Res 1514, *supra* note 60, “provided the basis for the process of decolonization”).

Even this was a substantial expansion over the tradition that self-determination was, under international law, a political principle rather than a legal right. See Ruth Lapidoth, *Sovereignty in Transition*, 45 J. INT’L AFF. 325, 337 (1992) (relying on the reports of the League of Nations Committee of Jurists and the Commission of Rapporteurs); see also *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the tasks of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, League of Nations O.J., Spec. Supp., 3 (1920); and *Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921) (both reports concluding that the

But the received view limited the exercise of the right to self-determination by the requirement that it not undercut the territorial integrity of existing states.²⁸¹ Professor Schachter has noted that some have articulated theories of self-determination applying it within independent states, but subject "to overriding principles of national unity and territorial integrity," or that it might even apply in noncolonial contexts "within a state whose inhabitants largely regard themselves with good reason as under alien domination."²⁸² He has emphasized, however, that "[m]any international lawyers and governments understood [the] declarations to exclude secession as a right of minorities within an existing sovereign state."²⁸³ Indeed, the cases often cited for the proposition that self-determination might extend beyond colonial situations collapse under further inspection.²⁸⁴ Thus, most scholars have been condemned to argue for the progressive

Aaland Islanders would remain under the control of Finland, which had established control upon its independence from the Soviet Union after the Bolshevik revolution in Russia, despite their desire to be joined to Sweden); *But see* Berman, *supra* note 45, at 1861-73 (arguing that the reports can be read to leave open the possibility that, in an "abnormal" period in which "sovereignty" can be said to have "lapse[d]," the peoples of an area are entitled to exercise the right of self-determination and the international community had the right to facilitate that process).

281. The United Nations' *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* confirmed G.A.Res. 1514 on Decolonization, *supra* note 60. G.A. Res 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 121, 124 U.N. Doc. A/80/28 (1970). But even though the Resolution also formally extended the right of self-determination to apply to "all peoples," *id.* Annex Principle 4, the Resolution could not be read to imply a right to secession given its commitment to "territorial integrity." *Id.* Principle 1. Nor even does the Convention on Civil and Political Rights (CCPR), which distinguishes individual rights from collective rights of the community in Article 27, include specifically a right to secession. CCPR, *supra* note 219; *see* Franck, *The Emerging Right to Democratic Governance*, *supra* note 276, at 58. As Franck has noted, the rule—if understood to apply to peoples outside the colonial context—suffered from inadequate legitimacy. *See* FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 69, at 166.

A wink in the direction of secession can be found in Article 2, paragraph 5, of the *Declaration on Minorities*, which specifically provides that national minorities "have the right" to "contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious, or linguistic ties." *See Declaration on Minorities*, *supra* note 277, art. 2, para. 5. Yet the wink is then disavowed by Article 8, paragraph 4, which states the Declaration "may [not] be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States." *See id.* art. 8, para. 4.

282. *See* Schachter, *Micronationalism and Secession*, *supra* note 274, at 183. India, for example, submitted a "declaration" limiting its consent to be bound under which it maintained that "self-determination" of peoples does not entail a right to secession from sovereign states. *Id.* One might argue that the fact of the Indian declaration is evidence of a general understanding that the CCPR does establish a general right of secession, but the argument would be stronger if the Indian Government has expressed its views as a "reservation." Vienna Convention, *supra* note 49, art. 2, ¶ 1(d).

283. Schachter, *Micronationalism and Secession*, *supra* note 274, at 180. Indeed, the norm of self-determination had never been operationalized outside the context of colonial situations, where historically-based criteria were available to identify territorial units capable of exercising the right of self-determination. *See* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 178 n.5 (1991) (conceding the "opponents of secession are probably correct as a matter of positive law"); *see generally* Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 16, at 101 (carefully reviewing each of the major human rights instruments touching upon the right of self-determination, including their negotiating histories, and establishing the absence of a right to secession); and Frowein, *supra* note 70, at 216 (contending that the "African practice [adopting the principle of the inviolability of colonial frontiers, otherwise known as *uti possidetis juris*, and thus barring secession] is proof for the proposition that self-determination does not include a rights of 'secession.' Otherwise, the OAU-Charter would be in conflict with *jus cogens* and thus be null and void."); *see also* Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, at 565-69 (Dec. 22) (suggesting that *uti possidetis juris* was consistent with the right of self-determination of peoples).

284. *See* Schachter, *Micronationalism and Secession*, *supra* note 274, at 183-84 (citing the two cases given by Professor Brilmayer in support of a broader right) (citations omitted).

In the case of Bangladesh, one might well see the Bengali people's right to secession, if one could be demonstrated, as flowing out of the colonial context, since the India-Pakistan War that lead to Bengali

development of the law of self-determination, such as through the articulation by the United Nations of criteria *de lege ferenda* for the identification of “peoples” seeking separation from states.²⁸⁵

But the Secretary-General located the right to self-determination in a broader context, one not limited to decolonization but functioning instead as a general limitation on the “sovereignty, territorial integrity and independence of States within the established international system.”²⁸⁶ The Secretary-General’s special attention to the status of minority

independence was itself simply the continuation of struggles that dated from the mismanaged decolonization of the Indian subcontinent. Brilmayer thus argues that:

[W]rongdoing occurred when European colonial powers fixed colonial borders to suit their own conveniences, and then left the borders intact when their empires receded. Great Britain, for example, was partly responsible for drawing borders in such a way as to place East Pakistan (present-day Bangladesh) and West Pakistan within one state.

Brilmayer, *supra* note 283, at 190. Located in this context, it is hard to see the Bengali case as relevant outside of the colonial context. And the sheer bizarreness of the lines drawn by the British in the sub-continent, separating the two portions of the Pakistani state by roughly a thousand miles, makes the case an awkward precedent even for colonial situations. *But see id.* at 182 (criticizing the so-called “salt water” theory for the lawfulness of secession).

Similarly, the Eritrean case is not one of secession within an existing state. Eritrea’s drive to independence after the dissolution in 1962 of the Ethiopian-Eritrean federation was not in fact an instance of a right to self-determination outside the colonial context. In fact, although it seems counterintuitive, in the special case of Eritrea, Ethiopia itself functioned as a colonial power. In the 1947 Treaty of Peace between the U.S., Italy, France, and England, it was determined that the peoples of Ethiopia and Eritrea would by plebiscite have an opportunity to exercise their right to self-determination. *See* 3 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 14–15 (1964). By plebiscite, a federal arrangement—in fact, a form of association so weak that confederalism may be an analytically more useful description—was approved in 1952. *Id.* at 27–28. Only the Ethiopian army’s forcible overthrow of the federation led the Eritrean assembly to vote itself out of existence. *Id.* at 32. The survival of a right to self-determination for the Eritrean people under these circumstances is not in any way evidence for a generalization of the right of self-determination outside of the colonial context. Thus, it was not a challenge to the African regional rule under which the boundaries of the states emerging from decolonization would be respected. *See* CHARTER OF THE ORGANIZATION OF AFRICAN UNITY art. 3, *reprinted in* ZDENEK Cervenka, *THE ORGANIZATION OF AFRICAN UNITY AND ITS CHARTER* 87 (1968) (affirming the sovereignty and territorial integrity of states); and *Border Disputes Among African States*, OAU Assembly of Heads of State and Government, First Ordinary Session in Cairo, 1964, AGH/Res. 16(I), *compiled in* ORGANIZATION OF AFRICAN UNITY, *ASSEMBLY OF HEADS OF STATE AND GOVERNMENT, RESOLUTIONS AND DECLARATIONS OF ORDINARY AND EXTRA-ORDINARY SESSIONS*, at 31–32 (whereby all members solemnly “pledge[d] themselves to respect the frontiers existing on the achievement of their national independence”).

285. *See* Schachter, *Micronationalism and Secession*, *supra* note 274, at 185 (“Even so, the question still remains whether the international community can reach a consensus on standards for determining which people (or communities) are entitled to secede.”) (emphasis added); *see also* Franck, *The Emerging Right to Democratic Governance*, *supra* note 276, at 60 (asserting that the right of self-determination is merely “poised to move toward still greater determinacy.”). Building on the teaching of the League of Nations Commission of Rapporteurs in the Aaland Islands Case, *Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, *supra* note 280, at 28 (1921), Schachter has offered criteria for making the right of self-determination determinate—under which a community with a distinct identity which has suffered a pattern of systematic discrimination would be entitled to secede only if the state had rejected the community’s reasonable proposals for autonomy and minority rights—but he does not claim that these criteria have as yet entered the general body of international law. Schachter, *Micronationalism and Secession*, *supra* note 274, at 185. And Franck has focused on the role of Human Rights Committee under the CCPR, *supra* note 219, in interpreting the Covenant’s commitment to self-determination. Franck, *The Emerging Right to Democratic Governance*, *supra* note 276, at 60.

286. AGENDA FOR PEACE, *supra* note 15, ¶ 19. The Arbitration Commission of the International Conference on Yugoslavia (the so-called “Badinter Commission,” named in honor of the Justice of the French Constitutional Court who presided) thus concluded that the right to self-determination included, “as one possible consequence,” the right for Serbs in Bosnia-Herzegovina to be “nationals” of Serbia/Montenegro. *See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 I.L.M. 1488, 1498 (1992). The Badinter Commission added that, whatever right to self-

groups thus performed an important constitutional function. For, as Beer and Amar have argued, the direct relationship between the supranational entity, the United Nations, and the "peoples" who constitute the international system—sometimes as mediated by states; sometimes through their representatives in as yet unrecognized states—is the core relation of a supranational constitution.²⁸⁷ The Secretary-General's direct appeal to nations and peoples seems particularly propitious at a time in history when the nation-state appears to be under great pressure.²⁸⁸

determinations the peoples of former Yugoslavia had, it was limited by the principle of *uti possidetis juris*. *Id.* at 1499 (Opinion 3).

The Badinter Commission's short opinions on these complex matters have not been free from criticism. *See, e.g.,* Frowein, *supra* note 70, at 215–18 (criticizing decision to apply *uti possidetis juris* as a limit on the exercise of a possible right to secession when at the time the opinions were rendered it was not clear that the right to self-determination had been invoked by minorities in the new states; in particular, the new states had not been recognized by the international community and, given the absence of any plebiscite on the question, the views of the peoples of former Yugoslavia had not clearly been expressed).

Yet the Badinter Commission's *ipse dixit* may well be defensible as the fulfillment, as a matter of general international law, of the intimations in the inter-war period of a supranational right, in anomalous cases, to intrude on the nation-state's power to define its members and thus itself. During this period, the Permanent Court of International Justice affirmed the power of the international community to determine who would be a member state, whether "communities" existed, and who would be a member of a "minority," as those terms were used in certain treaties creating an international role in the determination of the status of persons and therefore their rights. *See* Berman, *supra* note 45, at 1833–59; *see, e.g.,* Advisory Opinion No. 7, Acquisition of Polish Nationality, 1923 P.C.I.J. (ser. B) No. 7, at 21 (Sept. 15) (holding, based on the power of the international community to resolve the ambiguity in the treaties in favor of the protection of minorities in Poland rather than defer to Poland's right to define who would be "Polish," that the League of Nations guarantee under the Versailles Treaty and the Polish Minorities Treaty of 1920 applied to the treatment of certain German inhabitants of Poland); Advisory Opinion No. 17, Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, 1930 P.C.I.J. (ser. B) No. 17 (July 31) (in a debate over the meaning of the term "communities" under the Convention, generally adopting Greece's argument for a definition based on ethnicity and culture as understood by the Greek nation, rather than Bulgaria's argument for a definition based on the recognition of legal status as a community as prescribed in Bulgarian law; holding in favor of the Greek definition but as it would be determined and applied independently by the Mixed Commission established under the Convention); Rights of Minorities in Upper Silesia (Minority Schools) (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 12, at 46 (Apr. 26) (holding that, within certain limits, the German-Polish Convention conferred upon "every national the right" to declare whether she "belong[ed] to a racial, linguistic or religious minority," and thus had the right to attend a minority school).

287. *See supra* text accompanying note 166; *cf. supra* notes 166 and 177 (noting the different views of Justices Kennedy and Thomas on the existence of a "single People" of the United States).

288. The phenomenon has been observed by Gidon Gottlieb, who has tied this development to the resurgence of nationalism. The "nation," an idea of nineteenth century pedigree yet one at war with the fixed, territorial dimension of the state and thus international law's commitment to territorial integrity, has suggested that a new concept of sovereignty is necessary to facilitate new forms of association of nations overlapping with much less sovereign states. *See* GIDON GOTTLIEB, *NATION AGAINST STATE: A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY* (1993). Gottlieb calls for an "extension of the formal system of states to include alongside it a system of nations and peoples *that are not organized territorially into independent states.*" *Id.* at 36. Thus, Gottlieb calls for the development of "national home regimes," under which nationals would be given passports for a national home whose boundaries would not be coterminous with the boundaries of the state. *Id.* at 43. Thus, one could be a "citizen" of one state and a "national" of a separate national home. *Cf., e.g.,* Badinter Commission, Opinion No. 2, (contemplating simultaneous status for Bosnian Serbs as citizens of Bosnia-Herzegovina and nationals of Serbia/Montenegro); Berman, *supra* note 45, at 1883 (describing the international experiment in multiple status for persons as citizens and nationals of France or Germany but inhabitants of the Saar).

Similarly, Gottlieb calls for a functional approach to territorial boundaries of the state in which a variety of boundary lines would be drawn depending on the purpose for which it is drawn, such as one boundary for military defenses and another for access to water. *See* GOTTLIEB, *supra* note 288, at 46. The classical conception of "territorial integrity" is delivered a body blow under this approach, but the new unit of political decision-making in the international arena becomes the "nation," or "people,"—each of which conveys the concept of a distinct community holding the right to some degree of self-governance over matters uniquely concerning it. *See id.* at 35–47.

In effect, the Secretary-General spoke to the peoples of the world to make a claim for their allegiance, to mobilize their efforts to induce their governments to adopt his proposals, and invite them to engage in constitutional politics of the highest order. But what kind of politics? One version of the right of self-determination is, as Schachter suggests, fundamentally a “liberal response to threats of fragmentation,” which “relies on human rights and democracy to satisfy the claims of restive minorities.”²⁸⁹ Under this vision:

[M]inorities—ethnic, linguistic, religious and cultural—should be accorded special rights, beginning with the cultural and linguistic rights specified in Article 27 of the Covenant on Political and Civil Rights. Some of the liberal proposals go significantly beyond these rights. They contemplate a substantial degree of political autonomy for areas where a large part of the inhabitants belong to a distinctive ethnic or linguistic minority.²⁹⁰

The logical conclusion of such policies, Schachter adds, would be a “trend toward constitutional arrangements involving federal or confederal systems and various forms of local autonomy.”²⁹¹

But what would happen to liberal values if these tendencies were taken to their logical conclusion?²⁹² As Kenneth Anderson has argued in describing the dissolution of the

A “signpost on the road” to this future, see *Allegheny College v. National Chautauqua County Bank of Jamestown*, 159 N.E. 173, 175 (N.Y. 1927) (Cardozo, J.) (acknowledging changes in the common law carved out to fit the needs of selected areas, specifically eleemosynary institutions and contract law), might well be recent proposals for mixed sovereignty in Northern Ireland, in which the United Kingdom and the Republic of Ireland would share or divide competences over Northern Ireland. Compare Richard C. Holbrooke, *A Framework for Peace and Justice in Northern Ireland*, (Mar. 15, 1995 statement of Assistant Secretary for European and Canadian Affairs before the House International Relations Committee) 6 DEPT. ST. DISPATCH 279, 280 (1995) (stressing that the Joint Framework Document agreed to by the Prime Ministers of Ireland and the United Kingdom “does not provide for joint authority by the British and Irish governments over Northern Ireland.”) with Jack R. Payton, *Don't Be Fooled: N. Ireland Accord a Real Breakthrough*, ST. PETERSBURG TIMES, Feb. 23, 1995, at A2 (reporting that “[a] Northern Ireland Assembly will be established and some of its elected members will become part of a newly created cross-border authority that will include members of the Irish Parliament. The authority will have the power to coordinate policies on both sides of the border.”). Another such signpost might be the recent suggestion by President Nelson Mandela that he would consider the possibility of a “white homeland” in South Africa. Lynne Duke, *Mandela To Consider White Area*, WASH. POST, June 2, 1995, at A26.

289. Schachter, *Micronationalism and Secession*, *supra* note 274, at 181.

290. *Id.* at 181–82 (citation omitted).

291. *Id.* Christian Tomuschat has moved toward a remedial theory for secession in the context of an argument for a “federal” right to self-determination under which minority groups within a state, though not necessarily entitled to secession, would be able to claim a significant degree of autonomy. See Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 16, at 1, 13. Tomuschat insists that “it should be unequivocally clear then that the granting of a lesser or greater deal of political self-determination within the framework of a State cannot be used as a first step on a path that eventually must lead to separation from the State and complete independence.” *Id.* at 14. Yet he also argues that:

International law must not become a cause for unrest and turmoil. It is one thing to draw the logical conclusion from a permanent and gross misuse of its powers by a State against its citizens; it is quite another thing, however, to encourage the ultimate step when *other remedies* are still available.

Id. at 11 (emphasis added) (citations omitted). Thus, Tomuschat, like Brilmayer, *supra* note 283, concedes the possibility of lawful secession, notwithstanding the “territorial integrity” principle, but as a remedy for a breach of human rights even if the seceding group has no territorially-based historical grievance, though one grounded, like Brilmayer’s approach, on a “federal” right of “minority groups.” But see HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION 475 (1990) (arguing that, with some exceptions, the tradition of individual human rights adequately addresses the concerns that would be the subject of a “group right” to secession).

Socialist Federal Republic of Yugoslavia, the elements of the international constitution which assign rights to groups rather than individuals are fundamentally illiberal in nature, since under such regimes, “[i]n order to maintain the balance of group relations, individuals who threatened to unbalance it had to be smashed down absolutely.”²⁹³ This “pre-modern fable,” he argues, invites “tolerance of groups and intolerance of individuals; illiberalism and not liberalism.”²⁹⁴

Thus, any supranational constitution organized exclusively around the rights of minority groups to self-determination risks undermining the very democratic goals it ostensibly would serve. As Madison knew, a federalist structure built solely around the argument from community is not well-equipped to foster a government by discussion in which factional differences prevent tyranny and lead instead to rational consideration of the common interest.²⁹⁵ As Wilson knew, a polity could survive only if public affection forged through Madisonian national politics could bind peoples to each other.²⁹⁶

292. Lea Brilmayer, for example, acknowledges the argument that separatism, because it defines the national unit on the basis of ethnic or national groupings rather than individual consent, is anti-democratic. She claims, however, that it is wrong to conceive secession as based on a right of self-determination alone. See Brilmayer, *supra* note 283, at 186. She argues instead that secession is better grounded on the need to remedy a historical grievance. *Id.* at 189. Ethnicity plays a role, under her theory, but only as the efficient cause for the mobilization of a claim to secession as a remedy. *Id.* at 191. Yet, because “historical” facts are often reconstructed versions of the past to serve the needs of the present, it is doubtful historical truth provides the sturdy foundation Brilmayer needs to avoid the confluence of secession and anti-democratic, corporatist forms of government.

293. Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT’L L. 385, 428 (1993). But see SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* (1995) (locating the crisis in the Balkans, at least in part, in the pressure exerted by Western financial interests that economic, and therefore political, centralization was necessary, and thus foreclosing opportunities for fairly allocating the assets of the central state among the regions as centralization withered).

294. See Anderson, *supra* note 293, at 428. Given the anti-democratic tendencies of the Federalist argument from community, see *supra* Part V-D-1 text and accompanying notes 183–202, it is not surprising that a similar criticism has been leveled against the so-called “Communitarian movement.” See also *The Politics of Restoration*, *ECONOMIST*, Dec. 24, 1994, at 33 (arguing that low communitarians lack the courage of their convictions and are unwilling to use the coercive power of the state to “restore communities” when to do so might prejudice liberal values or, if high communitarians, they are willing to impose values from above and risk fascism); but see Amitai Etzioni, *Letter to the Editor*, *ECONOMIST*, Jan. 21, 1995, at 8 (claiming that communitarian’s goal to obtain liberty and moral order is achieved through dialogue).

Anderson rightly recognizes that behind the issue of how the Security Council should respond to the violence in the Balkans is the question of “how to conceive the political community that is called to respond.” Anderson, *supra* note 293, at 395. He argues that the “vision of policework” embodied in the establishment of the Bosnia War Crimes Tribunal “is fundamentally one of unitary world community,” which “requires a strong, and in [his] view, quite wrong assumption that the world is, and ought to be, evolving toward a global unity based on the supranational rule of law.” *Id.* Arguing that “enforcement of international law takes place in matters of war and peace, which is at most multilateralist rather than supranationalism,” *id.*, Anderson finally infers that multilaterally-based action must be justified by the interests of the intervenors rather than from the altruistic perspective that he attributes to “the privilege of dying for Kant and Perpetual Peace.” *Id.* at 396.

The supranational constitution suggested in this Article, however, is not based, as Anderson fears, on the airy clouds of altruism, or even liberal internationalism; instead, it is grounded on the supranational political process and in the interests of states, transnational institutions, and other transnational actors in ensuring collectively the enforcement of values felt necessary to constitute a world community capable of advancing the common interest.

295. See *supra* text accompanying notes 206–10.

296. See *supra* text accompanying notes 200–02.

2. Resynthesizing the Precedents for Collective Enforcement

The story this article reviewed earlier revealed a narrow original meaning to the enforcement exception; in particular, its legislative history indicated that enforcement action could not be taken by the Security Council when the "threat to the peace" upon which such action was predicated flowed solely from third states' reactions to developments within the target state.²⁹⁷ Reconsidering the meaning of Article 2(7) in the context of a general right of self-determination, it becomes possible to explain in constitutional terms changes in the meaning of the enforcement action exception. The early precedents for collective intervention, which stood out as anomalies, now can be cited as paradigms of the new constitutional regime, since their underlying rationales of respect for self-determination have been ratified by constitutional politics responding to the Secretary-General's proposals.

For example, the Rhodesia case might now serve as a paradigm for a research agenda of resynthesizing earlier precedents. With decolonization and the emergence of self-determination as a right of colonial peoples, international concern over the capacity of colonial peoples to exercise their right of self-determination was legitimate notwithstanding the Charter's negotiating history. The General Assembly's factual determination that Southern Rhodesia, now Zimbabwe, was a "non-Self-Governing territory" for purposes of Article 73(e) of the Charter, rather than simply a dependent territory of Great Britain, provided the textual basis for trumping Article 2(7).²⁹⁸ Accordingly, the Security Council subsequently treated the white Rhodesian minority's unilateral declaration of independence in violation of the black majority's right to self-determination as if it were itself a sufficient ground for the exercise of its Chapter VII authorities.²⁹⁹ The anomalous nature of this early foray into collective enforcement of minority rights was evidenced in the Council's nuanced handling of the Chapter VII determination, under which it never expressly stated that suppression of the right to self-determination constituted a "threat to the peace."³⁰⁰

297. See *supra* text accompanying notes 120-23.

298. See VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTIONS IN THE QUESTION OF SOUTHERN RHODESIA 124-25 (1990) (discussing U.N. G.A. Res. 1747).

299. See *id.* at 392 (arguing that the distinctive feature of the Council's practice here was the fact that the situation contained an "element of illegality with respect to Charter law, an element which is notably missing from those situations described under Chapter VI."). This suggestion seems to draw from the domestic analogy, under which the Security Council enforces order through the prevention and punishment of acts which might constitute international crimes, such as denial of the right to self-determination. See *id.* at 251-55 (discussing relevance to the Rhodesian case of Article 19(3) ("international crimes") of the International Law Commission's Draft Articles on State Responsibility).

300. As Gowlland-Debbas points out, the Council subtly drafted around this issue. In resolution 216, S.C. Res. 216, U.N. SCOR, 20th Yr., Res. & Dec., at 8, U.N. Doc. S/INF/20/Rev.1 (1965), and resolution 217, S.C. Res. 217, U.N. SCOR, 20th Yr., Res. & Dec., at 8, U.N. Doc. S/INF/20/Rev.1 (1965) (calling for economic sanctions), the Security Council asserted only that "the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave . . . and that its continuance in time constitutes a threat to international peace and security." GOWLLAND-DEBBAS, *supra* note 298, at 381 (quoting S.C. Res. 217, *supra* ¶ 1). The Council failed to find expressly that a "threat to the peace" actually existed. *Id.* at 382 (arguing that the language was intended to be equivalent to the earlier British draft of the resolution, under which the situation was "likely to endanger the maintenance of peace and security"). Similarly, when in resolution 221 the Council explicitly authorized for the first time enforcement action by a Member state, in this instance the United Kingdom, it found a "threat to the peace" only in a situation defined as "reports that substantial supplies of oil may reach Southern Rhodesia as the result of an oil tanker having arrived at Beira," S.C. Res. 221, U.N. SCOR, 21st Yr., Res. & Dec., at 5, pmbl. para. 2, U.N. Doc. S/INF/21/Rev.1 (1966), rather than in the Rhodesian declaration of independence itself. *Id.* at 405-06 (citing French and Uruguayan objections to any formulation suggesting the underlying problem between the United Kingdom and Rhodesia was not an entirely internal matter).

Thus, the Rhodesia precedent has widely been understood to represent a potential sea change in the meaning of the Charter if ever it were generalized to apply to noncolonial situations.³⁰¹

Now, perhaps, a deeper understanding of the meaning of the Council's practice with respect to decolonization can be achieved by confronting directly the possibility of *informal* Charter amendment. The end of the Cold War, the dissolution of the former Soviet Union and former Yugoslavia, together with the collapse of authoritarian governments propped up by the superpowers have generated cases of succession that revealed the emergence of a right of self-determination in general terms.³⁰² Expressed in the duty of governments to protect minority rights (including, if necessary, a right to secession), self-determination has become a general principle explaining much of the Security Council's use of its powers under Chapters VII and VIII in the post-Cold War Charter.

*B. The Argument from Liberty in the Federalist Supranational Constitution:
Reconstructing Chapters VII and VIII*

As Judge Weeramantry observed in the Lockerbie case, "The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict."³⁰³ The thesis of this Article is that, under the new supranational constitution, peace—or to put it in historical terms, the avoidance of another world war—is no longer the only central

301. Gowlland-Debbas, for example, argues that the Security Council's practice in the Rhodesian case reflects an "evolution, not dependent on any *formal* amendments to the Charter (which so far have been only numerical) but on a liberal interpretation drawn in large part from the doctrine of implied powers" GOWLLAND-DEBBAS, *supra* note 298, at 28–29 (emphasis added). But, as argued in this Article, changes wrought by constitutional politics, even if through *informal* amendments, are far more legitimate than relying on the High Priests of the academy and the chancelleries' lawyers to stretch the bands of interpretation beyond their breaking points.

302. Resistance to the new paradigm of self-determination suggested in this Article can be seen, for example, in the view of states that the newly independent states of the former Soviet Union and former Yugoslavia are bound, unlike the newly independent states that emerged from decolonization, by the predecessor state's treaty and other international law obligations. See Vienna Convention on Succession of States in Respect of Treaties, 15 I.L.M. 1640 (1986) (*compare* art. 16 (adopting the so-called *tabula rasa* rule for newly independent states) with art. 34 (providing for continuity of legal obligations in cases of separation of parts of a state) [hereinafter Vienna Convention on Succession]). *Tabula rasa* doctrine derives from the Lockean notion that the state, like the person in the state of nature, is born free and thus entitled to determine its own future. See JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (John W. Gough ed., 1947). The doctrine has never lived up to this poetic vision, however, since it seemed widely accepted that new states were bound by previously established customary law regardless of whether they accepted it. See Sir Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 49–53 (1962-II). Moreover, policies favoring stability and continuity play an important role in the law of treaties. See Vienna Convention, *supra* note 49, art. 26 (*pacta sunt servanda*). Thus, the United States argued that rule of continuity should govern the treaty and other relations of the newly independent states.

But, as Paul R. Williams argues, although the U.S. State Department formally insisted that legal obligations of the former states survived, the Department failed to preserve its position when it sought to rely instead on express assurances from the new states. See Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do they Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 41–42 (1995). What this argument fails to recognize, however, is that, with the generalization of a right to self-determination, the rules of succession that applied in the colonial context also became applicable to the newly independent states of the former Soviet Union, Yugoslavia and Czechoslovakia. Thus the State Department's failure to proceed exclusively on the basis of its theoretical position signalled its understanding that its theory was unreliable and that *tabula rasa* now fit better in the new legal landscape. Similarly, the Legal Advisers for the Council of Europe refused to advance a general theory of automatic succession. See *id.* at 16–18 (and citations therein).

303. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3, at 70 (Apr. 14).

organizing principle. The values set forth in the *Agenda for Peace* now have taken their rightful place. This requires a resynthesis of the Charter incorporating these new values and refashioning both the Charter regime for collective intervention and its relationship to Article 2(7).

1. The New Enforcement Actions

Students of the Charter have traditionally drawn a distinction between U.N. actions based on the consent of a state and enforcement action.³⁰⁴ Thus, because of the inapplicability of the enforcement action exception under Article 2(7), Bowett argued that peacekeeping operations could not extend to "matters essentially within the domestic jurisdiction" of a state.³⁰⁵ Thus, the neutrality of U.N. peacekeeping operations became their defining feature, and where U.N. peacekeeping strayed from this ideal (such as in Operation des Nations Unies dans le Congo (ONUC), the United Nation's deployment in Katanga to forestall its secession from the Congo under a theory of self-defense), they invited international criticism,³⁰⁶ because this kind of "self-defense" was arguably a pretext for enforcement action.³⁰⁷

304. See STEVEN R. RATNER, *THE NEW UN PEACEKEEPING: BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR* 56–57 (1995) [hereinafter RATNER, *THE NEW UN PEACEKEEPING*]. Traditional peacekeeping operations were thought to be grounded in Chapter VI. See, e.g., D.W. BOWETT, *UNITED NATIONS FORCES: A LEGAL STUDY* 65–68 (1964). Others have relied on Chapter VII but only Article 40's recommendatory powers. See, e.g., E.M. Miller, *Legal Aspects of the United Nations Action in the Congo*, 55 AM. J. INT'L LAW 1, 4–6 (1961) (author was later revealed to be Oscar Schachter, then an officer of the UN). Finally, some have found the authority for peacekeeping in no particular article or Chapter of the Charter but rather in implied powers that flow from the Security Council's responsibility to maintain international peace and security in accordance with the Charter's purposes and principles. See RATNER, *THE NEW UN PEACEKEEPING*, *supra* at 268 n.6 (citing the genealogy of Secretary-General Dag Hammarskjöld's famous remark, depending on the version, that peacekeeping was grounded in Article 6 1/2 or 6a).

305. BOWETT, *supra* note 304, at 425–26 (Bowett stated: "the problems of internal peace," thus civil war and the form of the domestic regime, "are not problems . . . for which a United Nations Force should assume any functional responsibility.") (emphasis in original). However, others have called the limits of Article 2(7) in relation to peacekeeping operations "more mirages than actual restraints." See RATNER, *THE NEW UN PEACEKEEPING*, *supra* note 304, at 31–33 (taking the view, based on the "relative conception" of the duty of nonintervention articulated by the Permanent Court of International Justice in the *Nationality Decrees Issued in Tunis and Morocco* Case, that the area "essentially within" the domestic jurisdiction of states has eroded to the vanishing point); see also ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 63–81 (1963); SOHN, *supra* note 38, at 41–44. Even Bowett, moreover, saw exceptions for cases of genocide or other gross violations of human rights, for such cases would encourage intervention which could be forestalled by a U.N. deployment. See BOWETT, *supra* note 304, at 426–27.

306. See William J. Durch, *The UN Operation in the Congo: 1960–1964*, in *THE EVOLUTION OF UN PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS* 315, 334–35 (William J. Durch ed., 1993). In that case, the Secretary-General advanced the then novel theory that a peacekeeping operation's right to engage in self-defense included the right to use force even when U.N. forces were not directly under attack. *Id.* at 344.

Dag Hammarskjöld's theory has become an argument of last resort in recent Security Council deliberations, under which the Secretary-General has suggested there exists the authority to "engage in the preemptive use of force to ensure security and freedom of movement." See UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL PURSUANT TO SECURITY COUNCIL RESOLUTIONS 982 (1995) AND 987 (1995), ¶ 55, S/1995/444 (1995) [hereinafter REPORT ON RES. 982 & 987] (but noting, in the context of the U.N. Protection Force for Yugoslavia [UNPROFOR], that such a preemptive use of force encourages escalation that ultimately places U.N. forces in greater jeopardy); see also, UNITED NATIONS SECURITY COUNCIL, LETTER DATED 29 NOVEMBER 1992 FROM THE SECRETARY-GENERAL ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, at 4, U.N. Doc. S/24868 (1992) (proposing a "show of force" by the U.N. Observer Mission in Somalia [UNOSOM], without calling for an enforcement action, thus implicitly relying on the U.N.'s right to self-defense). The Council ultimately rejected employing the legal fiction of intervention in Somalia based on a

On the other hand, the legal objection was weakened when the U.N. needed to fill a vacuum. The constitutional crisis in this newly independent Congo, which arose after U.N. forces had deployed at the request of the legitimate authorities, may have left the U.N. doubtful as to the legitimacy of local authorities and the relevance of any secessionist objections to the United Nation's deployment in Katanga.³⁰⁸ And it may even be the case that the collapse of centralized government in most of Somalia made it appropriate for U.N. forces to rely, as the Secretary-General initially proposed, solely on the broad theory of self-defense to permit the use of force necessary to fulfill their humanitarian mandate.³⁰⁹ Yet these situations are difficult to locate within the traditional confines of Chapter VI, Chapter VII, or Chapter VI 1/2 peacekeeping; for the government whose consent is presumed to be authoritative no longer exists.³¹⁰ In effect, under the peacekeeping model, although one might once have debated whether consent to a peacekeeping operation is irrevocable,³¹¹ this question becomes marginalized, if not entirely a "mirage."³¹² Thus, the

peacekeeping mission's right of self-defence and instead proceeded with a country-wide enforcement operation undertaken by a group of member states, which was one of the Secretary-General's preferred options. *Id.* at 4-5; see S.C. Res. 794, *supra* note 69.

307. As Under-Secretary-General Marrack Goulding has stated, a definition of self-defense to "include situations in which peacekeepers were being prevented by armed persons from fulfilling their mandate" was a "wide definition" indeed. See Marrack Goulding, *The Evolution of United Nations Peacekeeping*, 69 INT'L AFF. 451, 455 (1993).

308. See Durch, *supra* note 306, at 346 ("ONUC's initial mandate was to help the central government, but . . . there were up to four 'governments,' contending factions backed (to some degree) by outside powers who were equally at odds."). There is also, perhaps, a case that the use of force by the Economic Organization Monitoring Group (ECOMOG) in Liberia to enforce cease-fire agreements between the various Liberian factions may have been justified when the regime that invited ECOMOG's presence originally collapsed. See Letter addressed by President Samuel K. Doe to the Chairman and Members of the Ministerial Meeting of the Economic Organization of West African States (ECOWAS) Standing Mediation Committee (July 14, 1990) [hereinafter *The Doe Letter*], reprinted in REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 60-61 (M. Weller ed., 1994) [hereinafter *THE LIBERIAN CRISIS*] (stating that "it would seem most expedient at this time to introduce an ECOWAS Peace-keeping Force into Liberia to forestall increasing terror and tension and to assure a peaceful transitional environment.").

Yet, it has been argued that the Doe Government's consent may have been questionable. See Anthony C. Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 384 n.13, 402 (1994) (noting that President Doe initially opposed ECOWAS intervention and approved only as a last-ditch effort to forestall a rebel victory which was imminent). On the other hand, if in fact the rebel's success was due to foreign intervention, as was suggested publicly by the president of the Interim Government established under ECOWAS auspices after the collapse of the Doe regime, then it may well be that ECOWAS had a duty not to recognize the rebel-proclaimed government—thus, leaving ECOMOG, like the ONUC in the Congo, with a dearth of recognizable governments. See *Report: Sawyer Accuses Libya and Burkina Faso of Supplying Arms to NPFL* (BBC MONITORING REPORT, Oct. 8, 1990), reprinted in *THE LIBERIAN CRISIS*, *supra*.

309. See S.C. Res. 794, *supra* note 69; see also LETTER DATED 29 NOVEMBER 1992 FROM THE SECRETARY-GENERAL ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, *supra* note 306, at 4 (suggesting "a determined show, and if necessary use, of force" by U.N. peacekeepers, without undertaking an "enforcement operation").

310. See Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL'Y, Winter 1992-93, at 3 (arguing for U.N. conservatorships for such situations); and Steven R. Ratner, *The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 241, 265 (Lori F. Damrosch ed., 1993) (recognizing that, in such instances, "the concept of conservatorship intersects with international law notions of humanitarian intervention"); and RATNER, *THE NEW UN PEACEKEEPING*, *supra* note 304, at 268 n.6; see also Phillip J. Collins, *Reports of ASIL Program: ASIL Capitol Hill Briefing Held on U.S. Role in U.N. Peacekeeping*, ASIL NEWSLETTER (American Society of International Law, Washington, D.C.), Nov.-Dec. 1993, at 17 (Colonel James Terry, Legal Counsel to the Chairman of the Joint Chiefs of Staff, noting that the "U.S. military has trouble framing responses to missions which could be labeled 'Chapter 6½' where nonfighting peacekeeping gives way to shooting").

311. See RATNER, *THE NEW UN PEACEKEEPING*, *supra* note 304, at 37-39 (discussing the dispute over Dag Hammarskjöld's original understanding of Egypt's consent to the deployment of the United Nations Emergency

distinction between peacekeeping and enforcement may, in many cases, be difficult to maintain in practice, even setting aside the complication of whether the Council is undertaking action itself or delegating its authority to Member States.³¹³

It is not surprising then that, in the *Agenda for Peace*, the Secretary-General transcended the distinction, suggesting that “peace-enforcement” units be established for situations short of aggression, which would be governed by Article 43 but would “restore and maintain the cease-fire” previously agreed by the parties.³¹⁴ The Secretary-General believed that such units would “be under the command of the Secretary-General” and would “be warranted as a provisional measure under Article 40 of the Charter.”³¹⁵ Thus, under the Secretary-General’s proposal, peace enforcement would begin under the authority of the Security Council to make recommendations, rather than as enforcement action under Articles 41 or 42, and so would not benefit from the enforcement action exception of Article 2(7).³¹⁶

Yet, the Secretary-General’s concept of peace enforcement supposed the continuing relevance of Article 2(7),³¹⁷ despite its technical inapplicability to action under Article 40. But what would Article 2(7) mean in this kind of situation, where a state apparatus had dissolved or nearly dissolved? Also, with the emerging practice of delegation, and the technical doubts that delegated authority constituted “enforcement measures,”³¹⁸ how could the nonintervention principle apply? Our resynthesis of the Charter must look, rather, to the larger purposes which informed the domestic jurisdiction principle at the very beginning, which survive even under a legal regime that legitimates collective intervention for the purposes set forth in the *Agenda for Peace*.

As the negotiating history reveals, Article 2(7) was designed to prevent a state from making an internal issue within the target state a matter of international concern through its

Force [UNEF] in the Sinai in 1956, which Egypt subsequently withdrew in 1967, thus precipitating the Six Day War).

312. *Id.* at 31–33.

313. For example, the Council’s decision to authorize states to enforce its resolutions with respect to Iraq’s aggression against Kuwait fit squarely within the traditional Chapter VII paradigm of collective action against aggression, but the UN Legal Counsel thought that it was not “enforcement action” under Chapter VII. *See supra* note 75; but *see supra* note 76 (Secretary-General’s view that the authorization in S.C. Res. 678, *supra* note 3, was “enforcement action”). The reluctance to see a delegation of authority to a member state as enforcement action might have flowed from the questionable character of the first such delegation by the Security Council, S.C. Res. 221, where it asked the United Kingdom by name to take action on its behalf under circumstances where the “threat to the peace” finding did not comport with traditional conceptions of Chapter VII’s scope. *See supra* Part VII-A-2 text and accompanying notes 299–302; *see also* Weston, *supra* note 4, at 522 (observing that because Resolution 678 fit within neither articles 41 nor 42 some U.N. observers said it was based on article 42½). As Murphy has noted, *supra* note 62, if these actions were not enforcement actions, technically Article 2(7)’s exception for enforcement action would be inapplicable, although the Charter’s other “Purposes and Principles” would continue to govern. Given the uncertainty surrounding the issue, the better reading would seem to require an examination of the underlying rationale for Article 2(7) even in cases where the Council has expressed its desire to take in enforcement action.

314. *See* AGENDA FOR PEACE, *supra* note 15, ¶ 44; *see also* Peace Operations Policy Statement, *supra* note 64 (expressing the Clinton Administration’s endorsement of the concept).

315. *See* AGENDA FOR PEACE, *supra* note 15, ¶ 44.

316. That the Secretary-General envisioned a smaller role for the consent of states is also suggested by his definition of peacekeeping: “Peace-keeping is the deployment of a United Nations presence in the field, *hitherto with the consent* of all the parties concerned.” (underscore omitted) (emphasis added). *Id.* ¶ 20.

317. *Agenda for Peace* alludes to Article 2(7) in the context of humanitarian assistance by the U.N. *Id.* ¶ 30. In the context of a discussion of preventive diplomacy and peacemaking, the *Supplement to Agenda for Peace* affirms that “United Nations action” in internal conflicts “must be reconciled with Article 2, paragraph 7.” SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 27.

318. *See supra* notes 75–76 and 313 (comparing U.N. Legal Adviser and Secretary-General’s views on whether the authorization given by the Security Council to member states to use force constitute “enforcement measures” within the meaning of the exception to Article 2(7)).

own aggressive conduct.³¹⁹ The power of this perspective is borne out by the reaction to the U.N. deployment in Somalia pursuant to Resolution 814,³²⁰ in which a U.N. mission founded initially on peacekeeping principles was inexorably transformed into one with nation-building objectives that led, ultimately, to a backlash against U.N. intervention.³²¹ Because of the perception that states act in their own narrow interests rather than the interests of the world community, the threat of such a backlash is, in principle, even greater when the U.N. itself is not in direct command of the intervening force. Thus, in the context of regional collective action under the authority of the Security Council, Article 2(7) would seem to require the Security Council to authorize only those interventions justifiable on universal principles or global interests, rather than those advanced only by a regional hegemon (or even a regional consensus fabricated by a regional hegemon).

2. The Function of Collective Intervention Under the New U.N. Charter: Deliberative Democracy

During the Cold War, it was widely believed that the regional security organizations were more likely to serve as instruments of repression by the U.S. and the former Soviet Union than as neutral and impartial agents of the Security Council in the discharge of its responsibilities relating to international peace and security.³²² Indeed, doubt about the legitimacy of such organizations led many scholars to take a restrictive view of what organizations constituted regional organizations for purposes of Chapter VIII, excluding in particular both the Warsaw Pact and NATO.³²³ The end of the Cold War came so swiftly, however, that the U.N. has not yet had the opportunity to develop its own enforcement machinery. Also, the major premise in the argument against collective action through regional organizations, namely that intervention would become a cold war battlefield, seemed to disappear. Accordingly, in a variety of instances, the U.N. has been required to rely on Member States and the regional organizations to act on behalf of the Organization.³²⁴

319. See *supra* text accompanying notes 52–55 (discussing the Australian proposals).

320. S.C. Res. 814, U.N. SCOR, 48th Yr., Res. & Dec., at 80, U.N. Doc. S/INF/49 (1993).

321. As former Assistant Secretary of State Chester Crocker has suggested, “[t]here is no enthusiasm in most parts of the world for a latter-day, UN-managed colonial era.” Chester A. Crocker, *foreword* to JOHN L. HIRSCH & ROBERT B. OAKLEY, *SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING* at xiv (1995).

322. See, e.g., Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 822–35 [hereinafter Franck, *Who Killed Article 2(4)?*]; Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT’L L. 175, 224–25 (1969) (observing that U.S. employment of “regional autonomy” to circumvent the constraints of the Soviet Union’s exercise of the veto tended to replicate “spheres of influence” patterns); John N. Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT 122, 130 (Cyril E. Black & Richard A. Falk eds., 1971) (noting that during the Cold War the argument for regional autonomy was seen as an instrument of the Cold War, and thus undercut the argument for a broad role for regional organizations in collective security).

323. See Franck, *Who Killed Article 2(4)?*, *supra* note 322, at 829 (arguing that neither NATO nor the Warsaw Pact had the “machinery for arriving by a majority vote at decisions regarding enforcement actions”); and Akehurst, *supra* note 322, at 179–80 (detailing the gradual evolution of both superpowers’ views so as not to claim either the Warsaw Pact or NATO were Chapter VIII organizations, in order to avoid the counterclaim that use of force by either was subject to Security Council authorization and, thus, the other power’s veto).

324. See HIRSCH & OAKLEY, *supra* note 321, at 161 & n.12 (noting that “[t]he precedent set by the United States in organizing and commanding multilateral forces for the Gulf War and Somalia, with Security Council approval, was echoed by the French deployment to Rwanda . . . and U.S. deployment in Haiti” and employing the term “subcontracting” to describe this phenomenon).

The *Agenda for Peace* signalled the “reinterpretation” of Chapter VIII under which regional organizations would play a central role in enforcing the policies chosen by the U.N.³²⁵ The Secretary-General’s rhetorical strategy was, of course, to minimize the breadth of his revision of settled interpretations by claiming that the Cold War had merely “impaired the proper use of Chapter VIII.”³²⁶ Boutros-Ghali now described the regional organizations as instruments of community action, but in a way that reaffirmed, rather than challenged, the commitment to decentralization embedded in a new right to self-determination as a general norm:

Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.³²⁷

Thus, the transformed role of regional organizations, through a process of deliberative democracy at the U.N. confirming their legitimacy, would multiply the power of regional organizations and make them fit instruments for collective action serving the common interests of the world community.³²⁸

The Secretary-General’s arguments did not fall on deaf ears.³²⁹ The Security Council almost immediately invited regional arrangements “within the framework of Chapter VIII” to consider questions relating to the implementation of the Secretary-General’s report.³³⁰ The President of the International Court of Justice suggested that regional organizations might take advantage of the advisory opinion function of the Court when they are “engaged in joint responsibilities with the United Nations,” since the Court has, through this mechanism, “assisted in the maintenance of international peace by providing legal interpretations during disputes and removing the threat of conflict.”³³¹ Subsequently, in an

325. See Borgen, *supra* note 83; Boutros-Ghali, *supra* note 92.

326. AGENDA FOR PEACE, *supra* note 15, ¶ 60. The Secretary-General added: “[I]ndeed, in that era, regional arrangements worked on occasion against resolving disputes in the manner foreseen in the Charter.” *Id.*

327. *Id.* ¶ 64. The Secretary-General concluded that, “in the spirit of the Charter, and as envisioned in Chapter VIII,” the validation of regional efforts through the imprimatur of the Security Council might also “encourage States outside the region to act supportively.” *Id.* ¶ 65.

328. The Secretary-General’s argument thus seems to draw on the argument from liberty, as Madison and Wilson conceived it. See *supra* Parts V-D-1-2 text and accompanying notes 199–202. It would be hard to articulate substantive criteria for determining when a particular U.N. intervention under Chapters VI or VII amounts to unlawful intervention in a state’s liberty. Rather, Article 2(7) could be understood as the basis for a political-process based conception of domestic jurisdiction and the preservation of a community’s liberty. Under this approach, the deliberations of the Security Council in reviewing and authorizing collective action by regional organizations would assure that interference with domestic jurisdiction would not go beyond certain limits. The Council’s deliberations would function in much the same way as the deliberative democracy fashioned by Madison and Wilson for the United States, see *id.*, and thus preserve community autonomy in the international system.

329. The reduction of the *domaine reserve* to permit intervention by the Security Council in civil war is widely understood to require the democratization and strengthening of international institutions. See, e.g., Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond*, 15 MICH. J. INT’L L. 519, 527 (1994).

330. UNITED NATIONS, SECURITY COUNCIL, NOTE BY THE PRESIDENT OF THE SECURITY COUNCIL, at 1–2, U.N. Doc. S/25184 (1993). The General Assembly too has endorsed the Secretary-General’s efforts. See G.A. Res. 120B, U.N. GAOR, 47th Sess., Supp. No. 49(II), at 2, U.N. Doc. A/47/49(II) (1993).

331. Congress on Public International Law, U.N. Doc. L/2704 (statement of Justice Mohammed Bedjaoui) (U.N. publication forthcoming). Presumably Justice Bedjaoui refers to the Advisory Opinion in the Case concerning Namibia, No. 53, Continued Presence of South Africa in Namibia, *supra* note 41, which laid the

effort driven largely by the Russian Federation, the General Assembly adopted a Declaration on the Enhancement of Cooperation Between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security [the Declaration].³³² Paragraph 10 of the Declaration, in particular, signals general acceptance of an expansive role for regional organizations in "peace-keeping forces, for use as appropriate, in coordination with the United Nations and, when necessary, under the authority or with the authorization of the Security Council, in accordance with the Charter."³³³ The Declaration's negotiating history made clear that the delegation of authority to regional organizations would not undercut overall U.N. control of policy-making and implementation.³³⁴

The move toward delegation was balanced by increased demand for participation. Indeed, the Assembly in another context emphasized its demand for further democratization in the decision-making processes of the Security Council. For example, the Special Committee on Peace-keeping Operations noted that "some delegations believed that consultations as appropriate should be held to achieve transparency and to facilitate the widest possible participation of Member States. In this connection, a number of delegations expressed the view that the role of the General Assembly in peace-keeping matters should be enhanced."³³⁵ The call for broad participation in peacekeeping reached even transnational dimensions, with "several delegations" calling for the diversification sources

theoretical foundation for the Security Council's 1978 plan for Namibian independence. See S.C. Res. 435, U.N. SCOR, 33d Yr., Res. & Dec., at 13, U.N. Doc. S/INF/34 (1978), and its ultimate implementation as revised in accordance with S.C. Res. 629, U.N. SCOR, 44th Yr., Res. & Dec., at 2, U.N. Doc. S/INF/45 (1989), and S.C. Res. 632, U.N. SCOR, 44th Yr., Res. & Dec., at 3, U.N. Doc. S/INF/45 (1989). See generally CHESTER A. CROCKER, *HIGH NOON IN SOUTHERN AFRICA: MAKING PEACE IN A ROUGH NEIGHBORHOOD* (1992).

332. G.A. Res. 57, U.N. GAOR, 49th Sess., Supp. No. 49(1), at 296, U.N. Doc. A/49/49(1) (1994); See *Declaration on the Enhancement of Cooperation Between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security*, *id.* Annex [hereinafter *Declaration*]. See also UNITED NATIONS, GENERAL ASSEMBLY, SIXTH COMMITTEE (LEGAL), REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION, Agenda Item 140, U.N. Doc. A/49/741 (1994) (reporting the adoption of the Declaration by the Sixth (Legal) Committee without a vote); UNITED NATIONS, GENERAL ASSEMBLY, SIXTH COMMITTEE (LEGAL), REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION, Agenda Item 140, U.N. Doc. A/C.6/49/L.12 (1994) (draft resolution of the Declaration).

The significance of the statement is emphasized by the General Assembly's decision to entitle it a "Declaration." See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102 cmt. b (1986).

333. *Declaration*, *supra* note 332, para. 10. This latter clause opens the door to enforcement action by regional organizations under the authority of the Security Council. The consensus in support of the resolution may have suffered some cracks, however. After the Declaration was adopted by the Special Committee responsible for supervising its preparation, "one delegation" argued that cooperation between the U.N. and regional organizations "should be based on a recognition of the autonomy of the two systems and respect for their respective mandates and statutes." *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organizations*, U.N. GAOR 6th Comm., 49th Sess., Supp. No. 33, ¶ 86 U.N. Doc. A/49/33 (1994) [hereinafter *Report of the Special Committee*]. That delegation also "reaffirmed the sovereign right of all States at any time to bring any dispute to the attention of regional or international bodies and reserved its right to challenge any decision qualifying as a threat to regional peace and security matters falling strictly within the domestic jurisdiction of States." *Id.*

334. There was general support for the proposition that regional organizations were "subject to the overall discretionary powers and authority of the Security Council." *Report of the Special Committee*, *id.* ¶ 16. It was also made clear that "the Council's primary responsibility in the maintenance of international peace and security should not devolve only upon a small group of States." *Id.* ¶ 38.

335. See UNITED NATIONS, GENERAL ASSEMBLY, COMPREHENSIVE REVIEW OF THE WHOLE QUESTION OF PEACE-KEEPING OPERATIONS IN ALL THEIR ASPECTS: REPORT OF THE SPECIAL COMMITTEE ON PEACE-KEEPING OPERATIONS, Agenda Item 81, ¶ 25, U.N. Doc. A/49/136 (1994). The Committee also affirmed that it "welcomes the recent practice of members of the Security Council, including its President, of attending meetings between the Secretariat and troop-contributing countries." *Id.* ¶ 51.

of funding for peacekeeping “so as to include donations from business corporations and other non-governmental sources.”³³⁶

In principle, then, the organs of the United Nations and their constituents have generally accepted the Secretary-General’s proposals.³³⁷ The question then becomes whether the U.N. currently is functioning in the manner envisioned by the Secretary-General’s constitutional proposals on peacekeeping and peace enforcement.

3. The New Regional Security Organizations

Initially, there was significant doubt that the Charter contemplated more than a very limited set of regional organizations or arrangements under Chapter VIII.³³⁸ Yet it was always possible, in theory, to read the additional word “arrangements” in Chapter VIII as contemplating groupings of states having no permanent institutional superstructure.³³⁹ The Secretary-General seems to have proposed to expand this understanding of the term “arrangement” when he claimed: “The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security.”³⁴⁰

In practical terms, contrary to the understanding of Chapter VIII that crystallized during the Cold War, the Secretary-General’s new approach excludes very little, if anything at all; thus, Chapter VIII would now include NATO, which had previously been perceived to be excluded.³⁴¹ Similarly, the expanded definition includes such organizations as the

336. *Id.* ¶ 32.

337. See generally SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76.

This is not to say that reservations have not been expressed. For example, the Security Council made clear, even before the debacle in Somalia, that it preferred traditional peacekeeping missions wherever possible. See UNITED NATIONS, SECURITY COUNCIL, NOTE BY THE PRESIDENT OF THE SECURITY COUNCIL, at 1, U.N. Doc. S/25859 (1993) (“United Nations peace-keeping operations should be conducted in accordance with . . . the consent of the Government and, where appropriate, the parties concerned, save in exceptional cases . . .”).

338. See Franck, *Who Killed Article 2(4)?*, *supra* note 322, at 826–32; Akehurst, *supra* note 322, at 179–80. But see Moore, *supra* note 322, at 142–43 (pointing out that rejection of Egyptian proposal requiring geographic “proximity, community of interests or cultural, linguistic, historical or special affinities” for qualification as a regional organization or arrangement left the definition open-ended enough to permit the formation of such organizations having common interests “across geographic, ideological, ethnic, or religious boundaries”).

339. See Akehurst, *supra* note 322, at 177.

340. See AGENDA FOR PEACE, *supra* note 15, ¶ 61. Not to put too fine a point on it, the Secretary-General suggested that regional arrangements “could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.” *Id.*

341. See Franck, *Who Killed Article 2(4)?*, *supra* note 322, at 829; Akehurst, *supra* note 322. NATO’s early, limited role in Yugoslavia was implicitly approved by the Security Council in the months after the *Agenda for Peace* was issued. In Resolution 770, the Security Council acting under Chapter VII, “calls upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery . . . of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina.” S.C. Res. 770, U.N. SCOR, 47th Yr., Res. & Dec., at 24, ¶ 2, U.N. Doc. S/INF/48 (1992). Also, resolution 816, authorized members states, acting nationally or through regional arrangements, to enforce the no-fly zone in Bosnia and Herzegovina. S.C. Res. 816, U.N. SCOR, 48th Yr., Res. & Dec., at 4, ¶ 4, U.N. Doc. S/INF/49 (1993); see also SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 79 (“The Member States concerned decided to entrust those tasks to the North Atlantic Treaty Organization (NATO).”). The question of how NATO was assigned responsibility for enforcement of the no-fly zone—whether directly by the Security Council or indirectly through the Member States—cannot be a question of

Economic Community of West African States (ECOWAS) Military Observer Group (ECOMOG), a force constituted by West African countries within the context of ECOWAS, a purely economic organization,³⁴² to intervene militarily in the Liberian civil war.³⁴² Perhaps, under this expanded view, even an ad hoc collection of states organized solely for purpose of implementing Security Council resolutions authorizing the use of force to achieve Security Council objectives could be seen as a regional "arrangement" under Chapter VIII.³⁴³ These regional organizations would no doubt be instruments for the implementation of national goals. But in determining those goals, the regional groupings would engage in a deliberative process at the Security Council, where the common interest in a proposed intervention would emerge through a "deeper sense of participation, consensus and democratization in international affairs,"³⁴⁴ and, as suggested in the *Agenda for Peace*, thereby secure the support of states outside the region.³⁴⁵

significance when it was always clear that the Member States would immediately discharge these responsibilities through NATO. See Part VIII, *infra* text and accompanying notes for discussion of the Council's approval of a more extensive NATO role in the Balkans.

342. See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT, *supra* note 310, at 157, 183–89 (argument for treating ECOWAS as a regional organization for purposes of Chapter VIII).

The Secretary-General has now in fact described the U.N. mission in Liberia deployed in conjunction with ECOMOG, as well as the U.N. presence in former Soviet Georgia deployed in conjunction with the Commonwealth of Independent States (the CIS) of the former Soviet Union, as a form of "co-deployment" under which "the regional organization carries the main burden but a small United Nations operation supports it and verifies that it is functioning in a manner consistent with positions adopted by the Security Council." See SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 86(d).

343. This is not to say there are no limits or grounds for doubt as to the competence of a regional peacekeeping organization. Such concerns about a regional organization's competence within the terms of its own constitutive instruments repeatedly found their way into the Security Council and General Assembly's deliberations on the role of regional organizations. See, e.g., *Declaration*, *supra* note 332, pmbl. para. 11 (referring to "efforts made by regional arrangement or agencies, in their respective fields of competence"); see also *Report of the Special Committee*, *supra* note 333, ¶ 20 (expressing that regional organizations should act "within their spheres of competence"); UNITED NATIONS, SECURITY COUNCIL, STATEMENT BY THE PRESIDENT OF THE SECURITY COUNCIL, at 4, U.N. Doc. S/PRST/1995/9 (1995) [hereinafter STATEMENT BY PRESIDENT OF SECURITY COUNCIL] (recognizing the responsibilities of regional organizations "as reflected in their charters . . . to participate in efforts to maintain international peace and security").

The CIS's entry into the ranks of regional arrangements, in particular, points to the problematic features of this expansion. The final version of the *Declaration on Regional Arrangements*, see *supra* note 332, deleted a clause signalling an almost indiscriminate acceptance of all self-styled regional organizations. The earlier language provided that: "Regional arrangements and agencies that have not yet applied for observer status with the United Nations are invited to do so." *Draft Declaration on the Improvement of Cooperation Between the United Nations and Regional Organizations: Working Paper Submitted by the Russian Federation*, UNITED NATIONS GENERAL ASSEMBLY SPECIAL COMM. ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION, DRAFT DECLARATION 49th Sess., ¶ 14, U.N. Doc. A/AC.182/L.72/Rev.2 (1994). The Russian Federation presumably agreed to the deletion of this invitation when the CIS acquired observer status. See Lally Weymouth, *Yalta II*, WASH. POST, July 24, 1994, at C7 (reporting that Russia had demanded and received observer status for the CIS, thus effectively treating it, in the view of foreign diplomats, as a *de facto* "spheres of influence" regional arrangement).

Similarly, doubts have been expressed about the competence of the ECOWAS to create ECOMOG. See Wippman, *supra* note 342, at 187–89 (yet noting that, surprisingly, rebel leader Charles Taylor's patron state, Cote d'Ivoire, acknowledged during the Security Council's November 1992 debate on Liberia that "intervention by ECOWAS in Liberian affairs had its roots in the provisions of Article 4B of the ECOMAS Mutual Assistance Protocol"); and Ofodile, *supra* note 308, at 411 (arguing that the Protocol did not, by its terms, authorize intervention "when the conflict originated within a state or when it was supported, not by an outside force, but by a member state, as appears to be the case in Liberia"). That said, the Council in cooperating both with the CIS and ECOWAS in peacekeeping appears to have disregarded these concerns. See Part VII-B-4-a-c, *infra* text and accompanying notes 346–405.

344. AGENDA FOR PEACE, *supra* note 15, ¶ 64.

345. *Id.* ¶ 65.

4. Deliberative Democracy in Action: Liberia, Georgia, and Haiti

The Security Council review of proposed regional action—whether peacekeeping, peace enforcement, or pure enforcement action (in reality, it would be artificial to lump any of the post-Cold War cases into only one of these categories)—seems to validate the Secretary-General's thesis on the pro-democratic function of regional organizations in the U.N. system. A study of the first cases of collective action involving regional organizations after promulgation of the *Agenda for Peace* illustrates the emerging politics of federalist collective security.

(a) Liberia

The legality of the Economic Organization of West African States' (ECOWAS) initial intervention in Liberia in August 1990 is not free from doubt.³⁴⁶ Yet, the ECOWAS Military Observer Group (ECOMOG) persisted, and the United States (apparently believing that it was a lawful "peacekeeping" force) contributed funds to ECOWAS directly and to ECOWAS Member States for the purpose of sustaining the ECOMOG's efforts, at the request of internationally recognized authorities in Liberia, to enforce peace.³⁴⁷ The U.N. seemed to share the U.S. perception, when it relied on a letter of the Foreign Minister of Liberia, implicitly recognizing the interim authorities headed by Amos Sawyer (who

346. See Wippman, *supra* note 342, at 189; Borgen, *supra* note 83, at 816–20; and Ofodile, *supra* note 308, at 418. On the other hand, if the initial ECOWAS deployment was lawful, ECOMOG's subsequent use of force might have been justified on the ground of collective self-defense under Article 51 of the Charter. See U.N. SCOR, 47th Yr., 3138th mtg. at 54, U.N. Doc. S/PV.3138 (1992) (Statement of the representative of Sierra Leone: "The Government and people of Sierra Leone hold Charles Taylor [head of the leading rebel group, the National Patriotic Liberation Front (NPFL)] responsible for the armed attack he launched against my country and for the human and material damage he has inflicted against my country and its people.").

347. See U.N. Doc. S/PV.3138, *supra* note 346, at 76 (statement of the U.S. representative, Ambassador Perkins: "[W]e have provided a total of \$8.6 million in assistance to ECOWAS directly, and \$18.75 million in bilateral military grants to ECOWAS member States to support ECOMOG"); Section 551 of the Foreign Assistance Act of 1961, as amended by The International Security Assistance Act of 1979, provided the executive branch with legal authority to provide assistance to ECOWAS for ECOMOG, and it should be noted that employment of this authority may have been predicated on the executive branch's judgment that ECOWAS was a "peacekeeping" force in Liberia, rather than as an unlawful intervenor, Foreign Assistance Act of 1961, 22 U.S.C. § 2348, *added by* Act of 1979, Pub. L. No. 96-92, § 10(b), 93 Stat. 705 (1979) (authorizing assistance "for peacekeeping operations and other programs"). Perhaps the U.S. decision to support ECOWAS had something to do with the fact that the NPFL's leader, Charles Taylor, was the subject of an outstanding warrant for his arrest issued by the State of Massachusetts on a felony charge of escaping from jail. See *Hearing Before the Subcomm. on Africa of House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 15 (1990) (statement of Herman J. Cohen, Assistant Secretary of State, Bureau of African Affairs). This seemed to presuppose the consent of some authority in Liberia, perhaps that of the Interim Government National Unity (IGNU).

Yet, it cannot be denied that the U.S./ECOWAS position was problematic. Even the U.S. admitted in open Council debate that the leading rebel faction, the NPFL, "controll[ed] some 90 per cent of Liberian territory." U.N. Doc. S/PV.3138, *supra* note 346, at 73. This ordinarily would have required international neutrality. See 1 OPPENHEIM, *supra* note 28, at 165; *but see* Norton, *supra* note 60. Nonetheless, the U.S. at an early stage in the Liberian Crisis took the position that the NPFL was not entitled to speak internationally for the Republic of Liberia. See Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 90 AM. J. INT'L L. 263, 264 (1996) (reporting that the U.S. had filed statements of interest in lawsuits concerning title to property of the Republic of Liberia in which, as early as 1991, the U.S. asserted that the IGNU, rather than the NPFL, should be accorded standing on Liberia's behalf).

For the equally, if not more, problematic argument that ECOMOG was lawfully present with the consent given by former President Doe, which had neither lapsed with the collapse of the Doe regime nor been superseded by another lawfully constituted authority's decision to expel ECOMOG, *see* The Doe Letter, *supra* note 308; *but see* Ofodile, *supra* note 308.

"controlled," if that is the right word, only the Liberian capital, Monrovia) to respond to ECOWAS's request for an arms embargo.³⁴⁸ Moreover, it approved an arms embargo against Liberia, including all the factions in the civil war, but continued to permit international supply of arms to ECOMOG.³⁴⁹ Thus, from the beginning, it was argued that "success of the complementary efforts of ECOWAS and the United Nations in Liberia [would] largely determine the viability of the cooperation, so ardently desired, between the United Nations and regional arrangements in the quest to restore peace wherever it [had] been breached."³⁵⁰ Liberia would be a test case of the new supranational constitution.

With the conclusion of an agreement between the various Liberian factions at Cotonou, Benin, on July 25, 1993, the parties established a Joint Cease-fire Monitoring Committee, composed of representatives of the parties, ECOMOG, and the U.N.³⁵¹ But the partiality of the regional hegemon reared its ugly head, making clear the need to make ECOMOG less a Nigerian, and more a West African (and even African), force and to make available the resources to do so.³⁵² The Security Council concurred in the Secretary-

348. See S.C. Res. 788, U.N. SCOR, 47th Yr., Res. & Dec., at 99, pmbl. para. 14, U.N. Doc. S/INF/48 (1992); see also UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL ON THE QUESTION OF LIBERIA, ¶ 17, U.N. Doc. S/25402 (1993) (recounting that "recognition by the Organization of African Unity (OAU) and the United Nations of the Interim Government headed by President Amos Sawyer and the unwillingness of one of the main factions, the NPFL, headed by Mr. Charles Taylor, to recognize ECOMOG as an impartial and neutral force, led to a prolonged stalemate").

349. See S.C. Res. 788, *supra* note 348, ¶¶ 8-9. Moreover, the Council considered ECOWAS's action within the framework of Chapter VIII and made the specific finding for Chapter VII and VIII action required for enforcement action. See also *id.* pmbl. para. 5 ("Determining that the deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole"); *id.* pmbl. para. 6 ("Recalling the provisions of Chapter VIII of the Charter"). Thus, the resolution's specific provision for continued international arms supply for ECOMOG could easily be read as Council approval for ECOMOG's activities, even if they constituted enforcement action, under a theory of ratification under Chapter VIII. Cf. Wippman, *supra* note 342, at 186-87 (finding ratification in earlier Council discussions even without the adoption of a resolution touching upon the subject); but see Moore, *supra* note 322, at 163-64 (favoring ratification but requiring an explicit statement).

On the other hand, though the ECOWAS had imposed a blockade on the rebel factions, the Council did not go so far as to endorse explicitly this particular enforcement action. See U.N. Doc. S/PV.3138, *supra* note 346, at 8 (statement of the representative of Benin, Ambassador Holo, reporting decision of the ECOWAS to impose sanctions on the rebel factions, including the NPFL, after their violations of the provisions of the Yamoussoukro IV Agreement of 30 October 1991 establishing, *inter alia*, a cease-fire).

350. U.N. Doc. S/PV.3138, *supra* note 346, at 24-25 (statement of Senegalese representative, Ambassador Cissé, citing: "the appeal rightly made by the Secretary-General in Chapter VII of his report 'An Agenda for Peace'"). See also U.N. SCOR, 48th Yr., 3281st mtg. at 6, U.N. Doc. S/PV.3281 (1993) (statement by Liberian representative, Ambassador Bull, noting that Secretary-General's report: "reflects his desire to implement the principles enunciated in his report 'An Agenda for Peace'").

351. See UNITED NATIONS, SECURITY COUNCIL, FURTHER REPORT OF THE SECRETARY-GENERAL ON LIBERIA, ¶¶ 2, 9-14, U.N. Doc. S/26200 (1993).

352. To facilitate a political settlement, the Secretary-General reported:

Given the level of mistrust between ECOMOG and the NPFL . . . , [troops need to be supplied by] other ECOWAS countries, as well as from OAU countries outside of the West African subregion. In addition, it was proposed that the United Nations military observers would monitor and verify the cease-fire as well as the implementation of the encampment, disarmament and demobilization provisions of the agreement.

Id. ¶ 7. The Secretary-General also noted the United Nations had been asked by ECOWAS to "establish a trust fund which could be utilized to enable African countries to be able to send reinforcements to ECOMOG and to provide necessary assistance to countries already participating in ECOMOG." *Id.* ¶ 17. See also UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL ON LIBERIA, ¶ 24, U.N. Doc. S/26422 (1993) [hereinafter REPORT OF THE SECRETARY-GENERAL ON LIBERIA] (the Secretary-General's report that, based on the letter from the President of the Security Council "strongly endorsing" the proposal, he had established such a fund) (citation omitted).

General's judgment that there was a need to broaden the basis for ECOMOG's legitimacy. Thus, the resolution authorizing the United Nations Observer Mission in Liberia's (UNOMIL) deployment expressly provided that "[w]ithout participation in enforcement operations, [UNOMIL would] coordinate with the Military Observer Group [ECOMOG] in the discharge of the Group's separate responsibilities both formally, through the Violation Committee, and informally."³⁵³ On the other hand, whatever doubts may have existed about ECOMOG's authority to take enforcement action arguably were resolved in ECOMOG's favor.³⁵⁴ Indeed, the Council later commended ECOMOG "for its role in quelling an attempted coup d'état" against the Liberian National Transitional Government (LNTG) established pursuant to the Cotonou Agreement.³⁵⁵ The Security Council's engagement thus legitimized ECOMOG's role as an enforcement operation, while an impartial U.N. played a critical role in ensuring that ECOMOG employed force not to decide the civil war but to end it through agreement of the parties.³⁵⁶ As the Secretary-General observed:

ECOMOG's role in the four-year civil conflict in Liberia has been widely acknowledged as an innovation in regional peace-keeping. The addition of troops from the United Republic of Tanzania and Uganda has added a highly-valued Organization of African Unity (OAU) dimension to the operation. The efforts of ECOMOG, though questioned by some factions, have been greatly appreciated by most Liberians, as well as the international community, which recognizes the human and financial sacrifices made by the West African Governments.³⁵⁷

353. S.C. Res. 866, U.N. SCOR, 48th Yr., Res. & Dec., at 110–11, ¶ 3(h), U.N. Doc. S/INF/49 (1993) (emphasis added).

354. The express prohibition against enforcement action by UNOMIL would seem to suggest that "coordination" with ECOMOG in the "discharge of ECOMOG's separate responsibilities" might otherwise entail enforcement action, thus permitting the inference that ECOMOG's "separate responsibilities" contemplated enforcement action. The Secretary-General's proposal to the Security Council that, "should ECOMOG enter into planned peace-enforcement involving combat operations, UNOMIL observers would not participate in such actions and would, along with other United Nations staff, be temporarily withdrawn from the area," makes clear that, in approving UNOMIL's codeployment with ECOMOG, the Council was tacitly, if not expressly, approving enforcement action by ECOMOG under Chapter VIII. See REPORT OF THE SECRETARY-GENERAL ON LIBERIA, *supra* note 352, ¶ 14 (notably, UNOMIL would be withdrawn from the "area" of enforcement operations; that the withdrawal would be only "temporary") buttresses the case that only UNOMIL's safety, not its complicity, was at issue). The Secretary-General's report continues that, "should ECOMOG find itself constrained to enter into unplanned, self-defensive military actions, ECOMOG would have the obligation to ensure the security of UNOMIL observers and other United Nations staff present in the area." *Id.* Thus, the French representative emphasized that "primary responsibility for actually implementing the provisions of the [Cotonou] Agreement will fall to [ECOMOG] . . ." U.N. Doc. S/PV.3281, *supra* note 350, at 14–15. The Council's approval of enforcement action thus explains the repeated demands by many of its members during the debate on adoption of Resolution 866 that the Secretary-General "conclude with ECOWAS a formal agreement defining the respective roles and responsibilities of the two" operations. *Id.* at 16 (statement of the representative of the U.K., Ambassador Hannay); S.C. Res. 866, *supra* note 353, ¶ 4 (welcoming the Secretary-General's intention to do so "before deployment of the Mission [UNOMIL]").

355. S.C. Res. 950, U.N. SCOR, 49th Yr., Res. & Dec., at 77, pmbl. para. 7, U.N. Doc. S/INF/50 (1994).

356. See U.N. SCOR, 48th Yr., 3263d mtg. at 15, U.N. Doc. S/PV. 3263 (1993) (Statement of representative of Djibouti, Ambassador Olhaye: "The United Nations observer force, we believe, will provide the critically needed credibility and transparency, not only in cease-fire verification but also in the implementation of the encampment, disarmament and demobilization provisions of the Agreement."). Indeed, under the Cotonou Agreement, the start of disarmament was linked to the expansion of ECOMOG. See UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶¶ 3, 18–19, 21, U.N. Doc. S/26868 (1993) (discussing funding issues and delay in expansion to explain delays in implementation of the Cotonou Agreement).

357. UNITED NATIONS, SECURITY COUNCIL, FIFTH PROGRESS REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶ 12, U.N. Doc. S/1994/760 (1994).

And, while the process envisioned by the Council did not proceed as successfully as hoped,³⁵⁸ the United Nations engagement in Liberia resulted in the reorganization of ECOMOG in accordance with international objectives and, more important, initiated a pattern of supranational deliberative democracy.

(b) Georgia

The U.N.'s engagement in Georgia involved a step-by-step move toward increased cooperation with Russia, first in the context of the Conference on Security and Cooperation in Europe (CSCE) and later within the framework of the Commonwealth of Independent States (CIS), with democratic pressure for modifications in the CIS deployment to assure an internationally acceptable role for Russian forces.

In the early stages, the issues had not yet crystallized. In Resolution 849, the Security Council opened the door to U.N. observers of a cease-fire agreement between the Georgian government and rebel authorities in the breakaway province of Abkhazia.³⁵⁹ The Secretary-General initiated a process of U.N. engagement culminating in a joint U.N.-CIS deployment.³⁶⁰ A cease-fire agreement was signed at Sochi on July 27, 1993.³⁶¹ A week later, the Security Council approved deployment of a small advance team of U.N. observers "to begin to help to verify compliance with the cease-fire" agreement.³⁶² Later that month, the UN Observer Mission in Georgia (UNOMIG) was established.³⁶³ Its mandate was to "verify compliance with the cease-fire agreement," "investigate reports of cease-fire violations," and "report to the Secretary-General on the implementation of its mandate."³⁶⁴

358. Progress was stalled in diversifying ECOMOG, and it was subsequently reported that ECOMOG on some occasions became a combatant siding with certain factions against the NPFL. *See, e.g. id.*, ¶ 11; UNITED NATIONS, SECURITY COUNCIL, SEVENTH PROGRESS REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶¶ 24-25, U.N. Doc. S/1994/1167 (1994). Thus, as progress on implementation continued to elude the parties, the Secretary-General observed that "ECOWAS should be encouraged to consider strengthening ECOMOG and restructuring it in order to achieve a better balance of troops, including contributions from other African countries." UNITED NATIONS, SECURITY COUNCIL, EIGHTH PROGRESS REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶ 6(c), U.N. Doc. S/1995/9 (1995). The Secretary-General called for an extraordinary meeting of heads of state "to resolve their differences and harmonize their policies on Liberia." *Id.* ¶ 6(b). Only then perhaps could the settlement be implemented. Together with continuing divisions among the Liberian factions and the regional players, the shortage of funding for ECOMOG expansions seems to have played a critical part in undercutting the implementation of the reorganization of ECOMOG to ensure its performance in accordance with the common purposes of the international community rather than regional or national interests. *See* UNITED NATIONS, SECURITY COUNCIL, NINTH PROGRESS REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶ 9 (the Liberian parties), ¶¶ 11-12 (regional players), ¶ 25 ("Approximately 90 percent of the \$17 million . . . provided to ECOMOG through the Trust Fund has been earmarked for the two battalions which make up the expanded contingents of ECOMOG . . ."), U.N. Doc. S/1995/158 (1994). Thus, funds contributed left little for the original ECOMOG force or for any significant expansion and reorganization as contemplated by the Contonou Agreement. In sum, as perhaps in most things in Africa's bittersweet post-colonial history, UNOMIL's promise far exceeded its performance. Nonetheless, the Council has persisted in the effort, as late as January 29, 1996, extending UNOMIL's mandate and continuing the arms embargo. *See* UNITED NATIONS, SECURITY COUNCIL, S.C. RES. 1041, U.N. Doc. S/RES/1041 (1996).

359. S.C. Res. 849, U.N. SCOR, 48th Yr., Res. & Dec., at 64, U.N. Doc. S/INF/49 (1993).

360. *See id.* ¶ 5 (expressing support for the Secretary-General's cooperation in the CSCE's "efforts to bring peace to the region").

361. U.N. SCOR, 48th Yr., 3268th mtg. at 5, U.N. Doc. S/PV.3268 (1993) (statement of Russian Federation).

362. S.C. Res. 854, U.N. SCOR, 48th Yr., Res. & Dec., at 65, ¶ 1, U.N. Doc. S/INF/49 (1993).

363. S.C. Res. 858, U.N. SCOR, 48th Yr., Res. & Dec., at 65, U.N. Doc. S/INF/49 (1993).

364. *Id.* ¶ 2.

Moving a step in the direction of approving regional peacekeeping, the Council welcomed "the proposed deployment of mixed interim monitoring groups of Georgian/Abkhaz/Russian units designed to consolidate the cease-fire."³⁶⁵ However, the cease-fire collapsed, primarily due to Abkhazian violations, giving rise to considerable sentiment at the Security Council that Abkhazian nationalists were perpetrating a campaign of ethnic cleansing.³⁶⁶ When the parties to the conflict signed a Memorandum of Understanding on December 1, 1993, in effect reviving the Sochi cease-fire of July 27, the Security Council decided to reinvigorate UNOMIG and "[u]rge[d] the parties to take all steps necessary to ensure the security of Mission personnel, and welcome[d] the readiness of the Government of the Russian Federation to assist the Secretary-General in this regard."³⁶⁷

But some members of the Council began to express their doubts about the wisdom of relying on a regional power. The Brazilian representative, Ambassador Sardenberg (not surprisingly given the Latin American experience under the Monroe Doctrine) stated: "The deployment of United Nations personnel is always a delicate matter, and one that deserves to be considered with great caution and care." In the case of Georgia, that need is further accentuated by two important elements, "the involvement of the regional organization—the [CSCE]—and the presence in the area of military personnel from a third party."³⁶⁸ The third party, of course, was Russia. Others on the Council shared Brazil's doubts.³⁶⁹ Even

365. *Id.* ¶ 6. While the Council did not exactly say that the situation in Georgia was a "threat to the peace" for purposes of Chapter VII or Chapter VIII, it did determine that the "continuation of the conflict in Georgia threatens peace and stability in the region." *Id.* pmbl. para. 6. The French Ambassador, moreover, saw the situation as comparable to the Chapter VII/VIII situation in Liberia, noting that:

After Liberia, just recently, the Council is once again faced with a situation that is new to it, which consists in the United Nations intervening on the ground alongside other, regional players. This type of action poses a number of problems, in particular the problem of delimiting precisely who has what responsibilities.

U.N. Doc. S/PV.3268, *supra* note 361, at 3.

The term "Abkaz," although spelled in various ways in the documents cited in this Article, will hereinafter appear as "Abkaz" or "Abkhazian" without indicating that a different spelling might be found in the original documents.

366. See U.N. SCOR, 48th Yr., 3295th mtg. at 4, U.N. Doc. S/PV.3295 (1993). See also Statement of U.S. Ambassador Walker referring to "alleged acts of ethnic cleansing." *Id.*

367. S.C. Res. 892, U.N. SCOR, 48th Yr., Res. & Dec., at 68, ¶ 6, U.N. Doc. S/INF/49 (1993); see also U.N. SCOR, 48th Yr., 3325th mtg. at 9, U.N. Doc. S/PV.3325 (1993) (Statement of United Kingdom, Ambassador Richardson, welcoming the Russian role); S.C. Res. 896, U.N. SCOR, 49th Yr., Res. & Dec., at 61–62, ¶ 6, U.N. Doc. S/INF/50 (1994) (welcoming the "readiness of the Russian Federation to assist" UNOMIG personnel); S.C. Res. 876, U.N. SCOR, 48th Yr., Res. & Dec., at 67, ¶ 9, U.N. Doc. S/INF/49 (1993) (referring to the Russian Federation as "a facilitator" in the Georgian peace process). The Council even took note of "the appeal by the Government of the Republic of Georgia to the Russian Federation, the Azerbaijani Republic and the Republic of Armenia for assistance to protect and ensure the uninterrupted operation of railroads in the Republic of Georgia" and "welcomed[d] the improvement in security for the lines of communication [for U.N. mission personnel] that ha[d] followed the Russian Federation's response" UNITED NATIONS, SECURITY COUNCIL, STATEMENT BY THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/26706 (1993). But see S/PV.3325, *supra* at 13 (U.S. Ambassador Grey ignoring the Russian role).

368. U.N. Doc. S/PV.3325, *supra* note 367, at 14. For an excellent recent treatment of the Latin American perception of the Monroe Doctrine, see GADDIS SMITH, *THE LAST YEARS OF THE MONROE DOCTRINE: 1945–1993* 67–71 (1994) (arguing that, given low U.S. hopes for democracy in Latin America, particularly as embodied in a memorandum prepared in 1950 by George Kennan on the subject, the Doctrine survived through most of the Cold War as the implicit rationale for U.S. support for repressive regimes).

369. The U.S. also sounded a note of caution, suggesting that "the Council cannot get ahead of the parties themselves in efforts towards a political solution." U.N. SCOR, 49th Yr., 3332d mtg. at 11, U.N. Doc. S/PV.3332 (1994). And, in a statement that implicated the Australian concern in the drafting of the Charter, text accompanying *supra* notes 52–55, that a state could, through unilateral intervention, transform a situation within a state's domestic jurisdiction into a threat to the peace justifying U.N. intervention, the Czech representative

the parties to the conflict, while not opposed to the introduction of Russian forces, wanted Russian deployment to be part of multilateral intervention.³⁷⁰ Accordingly, Russia called for a larger U.N. involvement, expressing its support for “the appeal by the Georgian side for the deployment of a full-scale peace-keeping operation in Abkazia as the most important way to resolve the critically important problem of the refugees’ return.”³⁷¹

A turning point was reached in April 1994 with a series of agreements between the parties for a cease-fire and concerning principles for a political settlement and voluntary return of refugees and displaced persons.³⁷² At that stage, the parties turned to Russia to deploy a peacekeeping force to facilitate implementation of their agreements. At a meeting in Moscow on April 15, the CIS, while threatening to take unilateral action, made an “appeal to the Security Council of the United Nations to take an immediate decision to undertake a peacemaking operation in Abkazia.”³⁷³ In calling for U.N. “peacemaking,” and

dared to suggest that Russia had itself created the crisis by assisting Abkz extremists in the first place so as to create a security crisis that required Eduard Shevardnadze to join the CIS and request Russian assistance:

There is no question that involving the United Nations in any force that would have a substantial contingent of Russian troops, operating in a country which since 1801 has been almost uninterruptedly under Russian control, necessarily calls for such circumspection. . . . And we also recall President Shevardnadze’s words of a little over a year ago, addressed to the Secretary-General, when he found ‘Particularly disturbing . . . the participation of the Russian troops stationed in Abkazia on the side of Abkz extremists.’ We have to investigate whether the leopard has indeed changed its spots or whether we are talking about an entirely different animal.

Id. at 19 (citation omitted); *see also* Weymouth, *supra* note 343 (asserting that during the summer of 1993 Shevardnadze discovered that “Abkzian secessionists were beating back the Georgian army, thanks to Russian help.” Then, when former president Gamsakhurdia launched an offensive which nearly toppled Shevardnadze, “Georgia agreed to join [the CIS], while Shevardnadze signed a collective security agreement that allowed Russia to establish bases in Georgia,” and “Moscow dispatched 900 marines” who “enabled Shevardnadze to defeat Gamsakhurdia quickly.”).

370. In the Communiqué issued on January 13, the parties stated they “continued to favour the deployment in the conflict zone of United Nations peace-keeping forces or other forces authorized by the United Nations. They expressed their mutual consent to the use of a Russian military contingent as part of such forces.” UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 13 JANUARY 1994 FROM THE PERMANENT REPRESENTATIVE OF GEORGIA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, Annex 1, at 3, para. 2, U.N. Doc. S/1994/32 (1994) [hereinafter LETTER DATED 13 JANUARY 1994] (Communiqué on the Second Round of Negotiations between the Georgian and Abkz Sides in Geneva).

371. U.N. Doc. S/1994/332, *supra* note 369, at 7.

372. *See* UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 5 APRIL 1994 FROM THE PERMANENT REPRESENTATIVE OF GEORGIA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, Annex 1, U.N. Doc. S/1994/397 (1994) (Declaration on Measures for a Political Settlement of the Georgian/Abkz Conflict signed on 4 April 1994 witnessed by the Secretary-General’s Special Envoy, a representative of the Russian Federation, and a representative of the then Conference on Security and Cooperation in Europe (CSCE), which later became the Organization for Security and Cooperation in Europe (OSCE)) [hereinafter APRIL 4 POLITICAL DECLARATION]; *id.* at Annex 2 (Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons Signed on 4 April 1994 witnessed by representatives of the Russian Federation and the U.N. High Commissioner for Refugees).

373. *See* UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 20 APRIL 1994 FROM THE PERMANENT REPRESENTATIVE OF THE RUSSIAN FEDERATION TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, Annex, at 2, U.N. Doc. S/1994/476 (1994) (Statement by the Council of Heads of State of the Commonwealth of Independent States Concerning a Peace-keeping Operation in the Georgian-Abkz Conflict Zone) [hereinafter CIS PEACE-KEEPING STATEMENT]. The CIS Peace-keeping Statement added:

[I]n event that for any reason such a decision is not adopted in the very near future, in accordance with the spirit and principles of the [CIS] Treaty [on Collective Security], which calls for the safeguarding of the peaceful and secure development of the States Parties, [the CIS will] send to the conflict zone, with the agreement of the parties to the conflict, *peacemaking forces* consisting of military contingents from interested States Parties to the Treaty.

Id. (emphasis added).

contemplating its own "peacemaking" force, the CIS implied it would use force where necessary to enforce the cease-fire, even though the initial deployment would be based on consent.³⁷⁴

The Security Council responded to the challenge, however, as deliberative democracy resulted in an outcome consistent with the common interests of the supranational community. The Secretary-General rejected a "peacemaking" model for the intervention, insisting that "the absence of acceptance . . . of the United Nations proposals for the mandate and deployment of a United Nations peace-keeping force [made] it impossible for [him] to [recommend deployment] . . ."³⁷⁵ Because of the U.N.'s refusal to deploy, the parties agreed to a CIS deployment,³⁷⁶ and the Secretary-General was able to report an acceptable concept of U.N.-CIS cooperation after intense negotiations with Russia. Under this new CIS proposal, a CIS "peace-keeping force" and U.N. "military observers" would be deployed as "two separate and independent operations, each under its own command, but in close cooperation and coordination with the other."³⁷⁷

374. The CIS added that: "The carrying out of an operation by forces of States members of the Commonwealth of Independent States would in this instance fall within the framework of cooperation with the United Nations, in accordance with Chapter VIII of the Charter, which encourages the peace-keeping efforts of regional organizations." CIS PEACE-KEEPING STATEMENT, *supra* note 373, at 3. This last point was clearly designed to meet the requirements of Article 6 of the CIS Treaty on Collective Security, adopted by the Council of CIS Heads of State in Tashkent, which provided for "strict compliance with the U.N. Charter." See Treaty on Collective Security, May 15, 1992, reprinted in ROSSIYSKAYA GAZETA, May 23, 1992, microformed on Foreign Broadcast Information Service, FBIS-SOV-92-101, May 26, 1992, at 8-9. But nowhere in the Treaty on Collective Security do CIS states give advance consent to "peacemaking," which by definition would involve action not requiring contemporaneous consent. Rather, "peacemaking" would have required U.N. approval as enforcement action under Article 53 of the Charter. See U.N. CHARTER art. 53 ("no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council"); but see AGENDA FOR PEACE, *supra* note 15, ¶ 44 (locating the Council's authority to establish peace-enforcement operations commanded and controlled by the U.N. in the Council's Article 40 recommendatory powers). Accordingly, the CIS's reference to Chapter VIII's approval for regional "peacekeeping" skirted the larger question whether explicit Security Council authorization would be required for use of force by the Russian-led CIS "peacemaking" operation. The Russians thus appeared to pose a challenge to Security Council supervision and control of regional peacekeeping. See Moore, *supra* note 322, at 158-59; see also Akehurst, *supra* note 322, at 184 (discussing the requirement for advance authorization by the Security Council of regional enforcement action).

375. See UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL CONCERNING THE SITUATION IN ABKAZIA, GEORGIA, ¶ 20, U.N. Doc. S/1994/529 (1994) [hereinafter SITUATION IN ABKAZIA]. Nonetheless, the Secretary-General submitted as one of several options for the Council a proposal authorizing "the Russian Federation and its partners in CIS to deploy immediately in Abkhazia a non-United Nations force, with, however, a further option to subsume such a contingent subsequently in a United Nations force if and when the necessary conditions are established. . . ." *Id.* ¶ 21(b). In the sub-option, the Secretary-General explicitly analogized the relation between the Unified Task Force (UNITAF) and the second United Nations Operation in Somalia (UNOSOM II), although he did not make clear whether peace-enforcement was contemplated in Georgia, as it had been in the two Somalia operations. *Id.* ¶ 29. Like UNITAF, however, it was clear that expenses of the CIS peacekeeping operation would not be considered expenses of the Organization for purposes of Article 17 of the Charter. See *id.* ¶ 28.

376. See UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 17 MAY 1994 FROM THE PERMANENT REPRESENTATIVE OF GEORGIA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, Annex, U.N. Doc. S/1994/583 (1994) (Agreement on a Cease-Fire and Separation of Forces, signed in Moscow on 14 May 1994) [hereinafter MOSCOW AGREEMENT]. The Secretary-General reported to the Security Council that, under the Moscow Agreement, "the parties agreed that a *peace-keeping force* of the [CIS] would be deployed to monitor compliance with the Agreement. The parties also appealed to the United Nations Security Council to expand the mandate of [UNOMIG] in order to provide for their participation in the operations envisaged under the Agreement." See SITUATION IN ABKAZIA, *supra* note 375, Add.1, ¶ 2 (emphasis added).

377. *Id.* ¶ 4. Accordingly, the Secretary-General was able to propose a mandate for an expanded U.N. deployment under which UNMOG would "observe the operation of the CIS peace-keeping force deployed under the [Moscow] Agreement," "investigate violations of the Agreement," "maintain close contacts with both sides to

Yet the Security Council hesitated again, requesting the Secretary-General to pursue "clear understandings" with the "the parties, the Russian Federation and representatives of the CIS peace-keeping force" on certain matters, including "coordination between UNOMIG and the CIS peace-keeping force," "the period . . . for the mandate of the CIS peace-keeping force," "full freedom of movement for UNOMIG," and "the time-frame foreseen for the return of refugees and displaced persons."³⁷⁸ After the Council's remaining doubts about the scope of the CIS mandate were resolved³⁷⁹ (as were additional concerns about the expansion of the CIS force to include representatives of CIS members other than

the conflict, the CIS peace-keeping force and any other military contingents of the Russian Federation," and "report to the Secretary-General on the implementation of its mandate." *Id.* ¶¶ 7-7(d).

378. UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 16 JUNE 1994 FROM THE PRESIDENT OF THE SECURITY COUNCIL ADDRESSED TO THE SECRETARY-GENERAL, at 1, U.N. Doc. S/1994/714 (1994). The Russian Federation was mystified by the Security Council's insistence on a precise statement of the scope of the U.N. mission. Its U.N. Ambassador argued:

We feel there is no room in the Security Council for a double standard in approaching peacemaking operations. We expect the Security Council to provide no less genuine support for efforts to maintain peace in the Georgian-Abkaz conflict zone than it does with regard to conflicts in other areas and on other continents.

U.N. SCOR, 49th Yr., 3398th mtg. at 3, U.N. Doc. S/PV.3398 (1994) (debating S.C. Res. 934, U.N. SCOR, 49th Yr., Res. & Dec., at 65, U.N. Doc. S/INF/50 (1994)). Despite the Ambassador's complaints, Resolution 934 "[n]ote[d] with satisfaction the beginning of Commonwealth of Independent States (CIS) assistance in the zone of conflict, in response to the request of the parties . . .," thus confirming the consensual basis for Russian Deployment. S.C. Res. 934, *supra*, ¶ 2.

Ambassador Vorontsov's call for principled decision-making by the Council seems unwarranted, for there were differences in the procedural posture of the CIS deployment that warranted additional U.N. scrutiny. As Vorontsov himself stated, the CIS, "acting on the basis of the provisions of Chapter VIII of the Charter of the United Nations, and in response to a request by the parties, took the decision to introduce a collective force into the conflict zone." U.N. Doc. S/PV.3398, *supra*, at 2-3. The Russians did not wait for advance Security Council authorization, as they would be required to under Chapter VIII if the "peacemaking" operation they contemplated actually entailed use of force without the consent of the parties. See also discussion in *supra* note 374. Superficially, perhaps, the Ambassador may have had a point, since the Secretary-General had previously stated that peace-enforcement operations under U.N. command and control could be based on Article 40 of the Charter. See AGENDA FOR PEACE, *supra* note 15, ¶ 44. If the Russian believed that because U.N. peace-enforcement action was not necessarily an enforcement measure under Articles 41 or 42, CIS peacemaking also would not be an enforcement measure under Article 53, he would have been comparing U.N. apples to Russian oranges.

379. The doubts about the mandate of the CIS deployment may have been buried in the Protocol to the Moscow Agreement, which stated that "the function of the peace-keeping force . . . shall be to exert its best efforts to maintain the cease-fire and to see that it is scrupulously observed." See MOSCOW AGREEMENT, *supra* 376, ¶ 4 (Protocol concerning the peacekeeping force of the Commonwealth of Independent States). This formulation may have left the door open to an interpretation that "best efforts" included enforcement action, particularly since the deployment was described in terms of peacemaking. The Secretary-General in fact alluded to this language in his additional report responding to the Council's June 16 request for clarifications. See UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL CONCERNING THE SITUATION IN ABKAZIA, GEORGIA, U.N. Doc. S/1994/818 (1994). Explaining the "best efforts" language, he indicated the CIS force, a "peace-keeping force" he noted, "would be undertaking, in accordance with its mandate under the [Moscow] Agreement, tasks parallel to the tasks of UNOMIG." *Id.* ¶ 6. These parallel tasks involved monitoring and verification of the Moscow Agreement and did not provide explicitly for enforcement action. See *Id.* ¶ 5. Indeed, that the CIS force was understood by the Secretary-General not to contemplate enforcement action is confirmed by the Secretary-General's statement—in the context of describing CIS peacekeeping force's commitment to "take appropriate measures to ensure the safety of UNOMIG personnel"—that, "should the CIS peace-keeping force find it necessary to enter into self-defensive military actions, its forces will ensure the safety of UNOMIG and other United Nations personnel." *Id.* ¶ 19. The Secretary-General's reference in this statement to "self-defense" as a ground for use of force by the CIS would have been superfluous if the CIS's mandate included, as it arguably initially did under the Moscow Agreement, the right to take enforcement action, which would necessarily include the right to self-defense.

Russia),³⁸⁰ the “co-deployment” concept of operations became the basis for the Security Council’s approval of the expansion of UNOMIG and revision of the CIS force to conform with international peacekeeping principles.³⁸¹ With the carrot of U.N. participation, the stick of deliberative democracy at the Council had restrained Russian hegemonism.

Having restricted the CIS/UNOMIG co-deployment to a concept consistent with the common aims of the supranational community, the Secretary-General triumphantly concluded his report to the Council by noting that:

Should the Security Council accept my recommendations as contained in the present report, it will be the first time that the Council will be considering the expansion of the mandate of UNOMIG to extend to the verification and monitoring of the implementation of the Agreement by the peace-keeping force established by the Commonwealth of Independent States in one of the former constituent republics of the Soviet Union. This will be a further step in the new direction of cooperation in peace-keeping activities between the United Nations and regional organizations alliances, as has already been done with the

380. Some Council members were also concerned that the CIS be expanded. Ambassador Keating reaffirmed New Zealand’s belief that it was not “a good precedent for a neighbouring State to play such a predominant role.” U.N. SCOR, 49th Yr., 3407th mtg. at 7, U.N. Doc. S/PV.3407 (1994). *Accord id.* at 8 (Statement of Brazilian representative, Ambassador Sardenberg, referring to a state with “a direct interest”), *id.* at 9 (Statement of Czech representative, Ambassador Rovensky, referring to a state “with openly declared national interests”), and *id.* at 13 (Statement of Pakistani representative, Ambassador Marker, referring to a state with “direct political interests”). Accordingly, a broadening of the CIS peacekeeping force was sought to neutralize the risk of Russian partiality. *See id.* at 8 (Statement of Czech representative, Ambassador Rovensky, urging that “other CIS States, besides the Russian Federation, could as soon as possible contribute their troops to the peace-keeping operation”). To address this concern, the Russian Federation committed itself to broadening the CIS peacekeeping force to include a larger contribution from other members of the CIS. *Id.* at 5 (Statement of Ambassador Vorontsov).

381. *See* S.C. Res. 937, U.N. SCOR, 49th Yr., Res. & Dec., at 65–67, U.N. Doc. S/INF/50 (1994). The French representative to the Security Council underscored the point, affirming that:

It was . . . important to give UNOMIG the mandate to observe the action of the peace-keeping force of the CIS member States within the framework of the implementation of the Agreement of 14 May—a requirement that became legitimate once the United Nations was requested to participate in the implementation of the Agreement.

My delegation welcomes the fact that the Russian Federation has sought the support of the Council for a regional stabilization operation in the CIS and that this operation thus becomes a part of the process of a political settlement that is under the auspices of the United Nations It emphasizes the *regulatory functions that the Security Council has now shouldered for peace-keeping activities carried out by Powers or by regional forums.*

U.N. Doc. S/PV.3407, *supra* note 380, at 4 (emphasis added). The reference to peacekeeping by “Powers” was of course an oblique acknowledgment of Security Council approval for the French operation in Rwanda sanctified three months earlier. *See* S.C. Res. 929, U.N. SCOR, 49th Yr., Res. & Dec., at 10–11, U.N. Doc. S/INF/50 (1994).

The representative from New Zealand added that the resolution:

[W]elcomes the fact that the [CIS] force will act in accordance with the established principles and practices of the United Nations. These include, of course, those relating to peace-keeping, and it is worth recalling that the Security Council itself has approved a number of operational principles for peace-keeping, many of which would be applicable to non-United Nations forces which might be involved in peace-keeping.

U.N. Doc. S/PV.3407, *supra* note 380, at 6. Thus, the Council had been able to ensure that CIS peacekeeping would be based on internationally-accepted ground rules.

Organization of African Unity, the Organization of American States, the European Union and the North Atlantic Treaty Organization.³⁸²

The Secretary-General thus proclaimed the constitutional significance of the Council's decision.

(c) Haiti

The U.N.-authorized enforcement action to restore democracy in Haiti also demonstrates a pattern of accommodation by a regional power in response to deliberative democracy at the Security Council. From the beginning, the Security Council perceived the U.N.'s involvement as support for a regional consensus, not simply a response to the whims of the regional hegemon.³⁸³ Yet, it was soon understood by the Council that "there are

382. U.N. Doc. S/1994/818, *supra* note 379, ¶ 30. Yet, despite the Council's extensive consideration of the proposed co-deployment with the CIS peacekeeping force and its success in conforming the CIS deployment to U.N. standards, some delegations maintained they would not regard the resolution as a precedent. U.N. Doc. S/PV.3407, *supra* note 380, at 9 (Statement of Czech representative, Ambassador Rovensky). This fictive claim was put to rest, however, for the Nigerian representative made clear that the issue was not whether UNOMIG was a precedent. The question was whether it moved beyond existing precedents for U.N. cooperation with regional peacekeeping efforts:

The resolution we have just adopted has been described as ground-breaking. My delegation does not see it in that light. It is perhaps innovative in terms of language and drafting, but certainly not ground-breaking in terms of concept. With the demands for United Nations collective peace-keeping outstripping its ability and resources, it has already become clear and imperative that regional organizations and/or arrangements must step in. In all modesty, we in the West African subregion can claim to have already blazed that trail with the arrangement in Liberia of the Economic Community of West African States (ECOWAS), which was later complemented by the United Nations through its Observer Mission in Liberia (UNOMIL). We view the current resolution as a further development and refinement of a variant of that concept. We cannot but advert to the desirability of promoting cooperation between the United Nations and regional organizations in the maintenance of regional peace and security.

Id. at 12 (Statement by Ambassador Ayewah). The Nigerian representative's version of history seems well-founded, as several delegates made clear their contemporaneous understanding that the U.N. deployment in Liberia set a precedent of general applicability. See U.N. Doc. S/PV.3263, *supra* note 356, at 30 (Statement of Brazilian representative, Ambassador Sardenberg: "[A]n example of future undertakings between the United Nations and other regional organizations"); *id.* at 28 (Statement of French representative, Ambassador Mirimce: "[T]his first experiment"); *id.* at 31 (Statement of the representative of the Russian Federation, Ambassador Vorontsov: "[A] positive precedent for seeking ways to solve military conflicts and crises on the African continent within the framework of African efforts"); U.N. Doc. S/26422, *supra* note 352, ¶ 36 (noting "this relationship will be successful and may even set a precedent for future peace-keeping operations"); *id.* ¶ 42 ("The United Nations would be treading on fresh ground"); U.N. Doc. S/PV.3281, *supra* note 350, at 13 (Statement of U.S. representative, Ambassador Hicks: "The precedent set here [establishment of the United Nations Observer Mission in Liberia (UNOMIL)] of side-by-side operations by the United Nations and a regional group may have reverberations in other conflict areas which could perhaps be tackled in a similar manner if the world sees it work well in Liberia."); S.C. Res. 866, *supra* note 353, pmb. para. 5 ("Noting that [UNOMIL] would be the first peace-keeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization, in this case [ECOWAS]"). Ambassador Hicks of the United States was wrong, however; UNOMIL served as a precedent even though it did not succeed in quelling the conflict in Liberia. See *supra* note 354.

383. The then Soviet representative, in a poignant address in light of the failed August 1991 coup in the former Soviet Union, noted:

What is particularly important in this case is the proposal put forward at the twenty-first session of the General Assembly of the Organization of American States (OAS) concerning the establishment

limits to the tools available to the [regional organization, the Organization of American States (OAS)].” One government observed: “The OAS embargo on trade with Haiti is not binding on countries which are not members of that organization, thus reducing its impact and thereby allowing the illegal regime in Port-au-Prince to cling to power.”³⁸⁴ Nonetheless, when the Council unanimously adopted Resolution 841, imposing economic sanctions, it made a point of emphasizing the importance of the regional organization in setting policy on the question of Haiti.³⁸⁵

This remarkable resolution based its Chapter VII determination on the fact that, “in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security.”³⁸⁶ But what “circumstances” and “situation” did it contemplate? The Council noted “the incidence of humanitarian crises, including mass displacements of population, becoming or aggravating threats to international peace and security.”³⁸⁷ On the other hand, the Council made clear that a critical feature in its decision was the request of the Aristide Government’s Permanent Representative to the U.N. that sanctions be imposed.³⁸⁸ Indeed, the Council’s concerns over the legitimacy of its action in Resolution 841 were crystallized in the statement by its President that “Members of the Council have asked me to say that the adoption of this resolution is warranted by the unique

of machinery to protect democracy and the legal order in countries that belong to the OAS. We note that within the framework of this regional organization measures are now being taken with a view to restoring legitimate power in Haiti.

U.N. SCOR, 46th Yr., 3011th mtg. at 31, U.N. Doc. S/PV.3011 (1991) (Statement of Ambassador Vorontsov of U.S.S.R.). See G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. No. 49, at 13 ¶ 3, U.N. Doc. A/46/49 (1991). (asking the U.N. Secretary-General and U.N. member states to support the Secretary-General of the OAS and the OAS in implementing resolutions adopted by the Ministers of Foreign Affairs of the OAS on October 3 (MRE/RES.1/91) and October 8 (MRE/RES.2/91). These OAS resolutions adopted certain measures, including a request for “all States to cease transfers of military or police assistance, weapons and munitions to Haiti” and that “the United Nations and its specialized agencies . . . take into account the spirit and aims of the OAS resolution.” U.N. Doc. S/PV.3011, *supra* at 32–33 (United States reporting OAS action).

384. U.N. SCOR, 48th Yr., 3238th mtg. at 7, U.N. Doc. S/PV.3238 (1993) (Statement of Canadian representative, Ambassador Frechette, adding “the OAS found it necessary to seek the support of the United Nations”). It might be noted that even OAS member states may have had duties founded on other treaty commitments to Haiti which might have complicated implementation of sanctions recommended by the OAS. See *id.* at 17 (Statement by Brazilian representative, Ambassador Sardenberg, describing “the request by the legitimate Government of Haiti that the Security Council make universal and mandatory” sanctions since OAS sanctions were only “recommended”); see also Charter of the Organization of American States, adopted in 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394 (entered into force Dec. 13, 1951) (Article 71 states that the Councils of the Organization “may . . . make recommendations on matters within their authority”), reprinted in 33 I.L.M. 981 (1994).

385. S.C. Res. 841, U.N. SCOR, 48th Yr., Res. & Dec., at 119, pmbl. para. 12, U.N. Doc. S/INF/49 (1993) (“Recalling . . . the provisions of Chapter VIII . . . , and stressing the need for effective cooperation between regional organizations and the United Nations.”); see also U.N. Doc. S/PV.3238, *supra* note 384, at 17 (statement of Brazilian representative, Ambassador Sardenberg, including among the factors that made the Haiti Chapter VII determination unique that: “action has already been taken in the same direction by the OAS and by the General Assembly. That prior action provides a framework which warrants the extraordinary consideration of the matter by the Security Council and the equally extraordinary application of measures provide for in Chapter VII of the United Nations Charter”).

386. S.C. Res. 841, *supra* note 385, pmbl. para. 14.

387. *Id.* pmbl. para. 9.

388. See *id.* pmbl. para. 13 (defining “a unique and exceptional situation warranting extraordinary measures by the Council in support of the efforts undertaken within the framework of the [OAS]”); see also U.N. Doc. S/PV.3238, *supra* note 384, at 17 (statement by Brazilian representative, Ambassador Sardenberg, citing a “conjunction of different factors—in particular, the request by the legitimate Government of Haiti that the Security Council make universal and mandatory the measures recommended by the OAS”); cf. The Doe Letter, *supra* note 308 (which might have provided support for intervention notwithstanding Doe’s lack of effective control over Liberia).

and exceptional situation in Haiti and should not be regarded as constituting a precedent."³⁸⁹ Of course, every lawyer knows that precedents, like fire or the secret of the atom, are hard to disinvent.³⁹⁰

The pattern of hesitation reemerged after the USS *Harlan County* was rebuffed in its efforts to deploy the advance contingent of the new United Nations Mission for Haiti (UNMIH),³⁹¹ with Brazil once again supporting the resolution reimposing sanctions only "on the understanding that it does not and will not constitute a precedent for the work of the United Nations."³⁹² The United States, it should be noted, did not at this stage evince a desire to seize upon the noncompliance of the de facto authorities as a ground for escalating the conflict.³⁹³ The focus of debate at the Council remained on maintaining the regional

389. U.N. Doc. S/PV.3238, *supra* note 384, at 9.

390. Indeed, the Council initially warmed to the idea of considering Resolution 841 a precedent for future U.N. regional organization cooperation. After the apparent agreement of the Haitian de facto authorities to the restoration of President Aristide, *see* UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE SECRETARY-GENERAL, THE SITUATION OF DEMOCRACY AND HUMAN RIGHTS IN HAITI, U.N. Doc. A/47/975 (1993) (also published as U.N. Doc. 5/26063) (reporting the signature of the Governors Island Agreement); UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE SECRETARY-GENERAL: THE SITUATION OF DEMOCRACY AND HUMAN RIGHTS IN HAITI, U.N. Doc. A/47/1000 (also published as U.N. Doc. 5/26297) (1993) (reporting the signature of the Pact of New York), the Brazilian representative, Ambassador Sardenberg even suggested that:

[A] fruitful partnership between the United Nations and the Organization of American States, which proved to be an important success story on the virtues of Chapter VIII of the United Nations Charter, must be preserved and continue to be carried out until a definite solution to the crisis in Haiti is achieved.

U.N. SCOR, 48th Yr., 3271st mtg. at 14, U.N. Doc. S/PV.3271 (1993); *see also id.* at 17–18 (Statement of U.S. Ambassador Albright). Albright proclaimed:

Our success today also provides a glimpse into the future, a glimpse of a greater vision my Government sees for the United Nations. That vision is not only to reform those States that have spurned the community of nations, not only to embrace the new democracies that so wish to become good citizens in this community, but also to restore the failed States so that they too can rejoin this community.

Id. These two statements were made in the context of the suspension of sanctions against Haiti in response to the Governors Island Agreement and the Pact of New York, which it was thought would result in implementation of U.N., UNGA and OAS objectives. *See* S.C. Res. 861, U.N. SCOR, 48th Yr., Res. & Dec., at 121, U.N. Doc. S/INF/49 (1993).

391. U.N. SCOR, 48th Yr., 3289th mtg. at 2–3, U.N. Doc. S/PV.3289 (1993). After the *USS Harlan County* incident, the President of the Security Council made the following statement:

The Security Council . . . deplores the events of 11 October 1993, when organized armed civilian groups ('attachés') threatened journalists and diplomats waiting to meet a contingent of [UNMIH] . . .

The Council reiterates . . . that serious and consistent non-compliance with the Governors Island Agreement will prompt the Council to reinstate [the economic sanctions suspended six weeks earlier], with particular emphasis on those measures aimed at those deemed responsible for this non-compliance.

Id. (citations omitted). For the mandate of UNMIH, *see* S.C. Res. 867, U.N. SCOR, 48th Yr., Res. & Dec., at 122, ¶ 3–4, U.N. Doc. S/INF/49 (1993); *see also id.* at ¶ 1, 9 (authorizing and requesting immediate deployment).

392. U.N. SCOR, 48th Yr., 3293d mtg. at 24, U.N. Doc. S/PV.3293 (1993) (statement of Brazilian representative, Ambassador Sardenberg); *see also id.* at 18 (Statement of Chinese representative, Ambassador Li Zhaoxing, voting in favor of the resolution "in light of the formal request of President Jean-Bertrand Aristide, supported by the Latin American countries and the OAS . . . The measures authorized . . . are special actions taken under the unique and exceptional circumstances in Haiti, and they should not establish a precedent.").

393. *See* U.N. SCOR, 48th Yr., 3291st mtg. at 4–5, U.N. Doc. S/PV.3291 (1993). Ambassador Albright emphasized that the United States had "never suggested or threatened an intervention in Haiti over the opposition of the military, nor has that course of action ever been endorsed or proposed by Haiti's elected President, Jean-

consensus rather than on implementing U.S. wishes.³⁹⁴ Thus, to reimpose sanctions, the Council now predicated its finding of a “threat to peace and security” expressly on “the failure of the military authorities in Haiti to fulfill their obligations under the [Governors Island] Agreement,” and, apparently for the first time, stated explicitly that it was “[a]cting under Chapters VII and VIII of the Charter.”³⁹⁵ Concerns were expressed in the General Assembly about the Council’s legal theories,³⁹⁶ and the fear of improper influence by the regional hegemon at the Council could never be totally suppressed.³⁹⁷ Nonetheless, the

Bertrand Aristide. This has never been—nor should it be—some kind of gunboat diplomacy.” *Id.* at 4. The U.S. position was to “maintain the pressure for democratic change in every manner possible, short of an armed intervention that no one wants.” *Id.* at 5. However, the United States was prepared to use its military power to assure enforcement of sanctions. See U.N. Doc. S/PV.3293, *supra* note 392, at 6–7 (Statement of U.S. representative, Ambassador Albright: “[t]here should be no doubt about the determination of the United States . . . [The U.S.] Government will use its diplomatic and military power to see that economic sanctions work . . .”).

394. The UNMIH had continued the pattern of cooperation with the OAS, contemplated the joint “oversight of the Special Representative” of the United Nations and OAS Secretaries-General, “so that the peace-keeping Mission may benefit from the experience and information already obtained by MICIVIH.” S.C. Res. 867, *supra* note 391, ¶ 5.

395. S.C. Res. 875, U.N. SCOR, 48th Yr., Res. & Dec., at 125, pmb. paras. 7–8, U.N. Doc. S/INF/49 (1993) (emphasis added). By contrast, the Council’s statement in its resolution authorizing enforcement action by coalition forces in Somalia for humanitarian purposes did not explicitly invoke Chapter VIII to authorize enforcement action. See S.C. Res. 794, *supra* note 69. Rather, when it stated in Resolution 794 that it was “[a]cting under Chapters VII and VIII,” the Council made no new decisions and only “call[ed] upon States . . . to use such measures as may be necessary to ensure strict implementation” of the arms embargo imposed under Chapter VII pursuant to operative paragraph 5 of Resolution 733 of January 23, 1992. *Id.* ¶ 16. Only the Council’s “decisions” are binding. See U.N. CHARTER art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”). One could read Resolution 794 to make a “decision” authorizing enforcement action under Chapter VIII only if by implication the decision made in Resolution 733 was restated, albeit silently.

396. Yet some members were unpersuaded, arguing instead the Council had exceeded its constitutional authority. Responding to statement of President Aristide to the General Assembly, the Colombian delegate, Ambassador Jaramillo, said:

[T]he Council has acted in areas involving the restoration of democracy, when such questions should be acted upon by the General Assembly or the competent regional body. The Council has also assumed authority with regard to legal controversies that are often bilateral in nature and therefore attributed by the Charter to the International Court of Justice.

In addition to those areas, we might also mention all the situations created by internal power struggles, in which the United Nations should refrain from intervening save for exceptional cases as authorised by the Charter and by consistent United Nations practice.

It seems to us that in none of those situations are international peace and security truly threatened. What is more, it is faulty reasoning to argue that non-compliance with an agreement reached between two factions vying internally for power constitutes in itself a threat to international peace and security.

U.N. GAOR, 48th Sess., 41st plen. mtg. at 7–8, U.N. Doc. A/48/PV.41 (1993); see also *id.* at 14 (Statement of Algerian representative, Ambassador Lamamra, maintaining that “under the terms of the Charter, there is at least shared competence between the General Assembly and the Security Council regarding maintenance of international peace and security”). Ambassador Collins, the representative of Ireland, added that:

It would be unfair not to acknowledge that the dramatically increased workload has created a new situation for those States which are not members of the Security Council.

. . . [T]he extent of informal consultations and the lack of a mechanism for transparent dialogue between the membership of the General Assembly and the members of the Security Council in relation to informal consultations have become matters of serious concern to the membership at large.

Id. at 18.

397. One state questioned whether there was a perception that the Council was being manipulated to “advance the foreign policy interests of a member or group of members.” A/48/PV.41, *supra* note 396, at 9

Council took the view that it was the show of bad faith by the Haitian authorities' breach of an agreement achieved through regional action, rather than simply defiance of the regional hegemon, that would serve as the basis for enforcement measures.

Therefore, almost completely disregarding the Assembly's concerns, the Council moved forward on May 6, 1994, to adopt a comprehensive sanctions regime.³⁹⁸ This decision should have decided the legal issue whether use of force was also permissible, since both economic sanctions under Article 41 and military action under Article 42 or the general powers of the Council in Chapter VII are equally forms of coercion that technically would have the same benefit from the enforcement action exception of Article 2(7) (to the extent it is also applicable for delegations by the Council to states to undertake enforcement action on its behalf).³⁹⁹ Thus, when the moment of truth came to decide whether to authorize use of force to restore the Aristide Government, the Council's members again questioned the legal basis for the use of force even though Resolution 940 was adopted with 12 votes in favor and only two abstentions.⁴⁰⁰

(Statement of Malaysian delegate, Ambassador Redzuan). On the other hand, the same delegation welcomed the increasing transparency of Council deliberations. *Id.* at 10 (noting the decision of the Council to provide in advance the provisional agenda of its formal meetings).

398. See S.C. Res. 917, U.N. SCOR, 49th Yr., Res. & Dec., at 47, U.N. Doc. S/INF/50 (1994).

399. See *supra* notes 75, 76, and 313.

400. S.C. Res. 940, *supra* note 3; see also U.N. SCOR, 49th Yr., 3413th mtg. at 12, U.N. Doc. S/PV.3413 (1994) (adopting S.C. Res. 940, *supra* note 3, with Brazil and China abstaining). The Secretary-General himself had proposed the use of force and had reported that an intervention under U.N. command and control was simply beyond the present means of the organization, leaving only the option of a U.N. authorization for action by member states. See UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS MISSION IN HAITI, ¶¶ 8–10, 25, U.N. Doc. S/1994/828 (1994) [hereinafter REPORT ON HAITI]. The U.S. representative, Ambassador Albright, relied expressly on the Kuwait and Rwanda precedents (ignoring, not surprisingly, given its disastrous political complexion, the apparently closer precedent of Somalia). U.N. Doc. S/PV.3413, *supra* at 13.

Other supporters were somewhat lukewarm. See *id.* at 21–22 (Statement of representative of New Zealand, Ambassador Keating, objecting to intervention by a regional power rather than by the U.N. itself); *id.* at 7 (Statement of representative of Uruguay, Ambassador Piriz-Ballon, relying on a restrictive interpretation of the principle of non-intervention not to "support any military intervention in the fraternal Republic of Haiti, whether it be of a unilateral or multilateral nature"). Spain and Pakistan appear to have endorsed the action on the limited ground that it had been requested by President Aristide. *Id.* at 19 (Statement of representative of Spain, Ambassador Yañez-Barnuevo); *id.* at 25 (Statement of Pakistani representative, Ambassador Marker). Even Nigeria had its doubts. See *id.* at 11 (Statement of Nigerian representative, Ambassador Ayewah, expressing concern that, "whatever we do here in the Security Council, the sovereignty and territorial integrity of Haiti should not be compromised"). But—perhaps because of Nigeria's own experience as the leading power in ECOMOG, which had seen repeated violations of various cease-fires by the Liberian factions, see *supra* note 358—Ayewah focused on the fact that "the draft resolution is predicated on the failure of the military Government in Haiti to honour the Governors Island Agreement, which it freely entered into with the ousted President Aristide." *Id.* Argentina was the only Latin American country to make a strong statement in favor of U.N. action. See *id.* at 14–18 (statement of the Argentina representative, Ambassador Cardenas). Cardenas noted that, in effect, use of force was the last resort to respond to a humanitarian crisis. *Id.* at 17.

A few states even disputed the Secretary-General's legal conclusion that use of force was permissible, yet voted for the resolution anyway. See *id.* at 4–5. Ambassador Flores Olea of Mexico argued that:

[T]he crisis in Haiti, in our opinion, is not a threat to the peace . . . as would warrant the use of force in accordance with Article 42 of the Charter. The foundation for the actions proposed, as can be seen from the report of the Secretary-General, appears to be previous practice, that is, precedent. Every situation, however, is different.

Id. at 4. Mexico also considered the draft resolution "a kind of carte blanche . . . awarded to an undefined multinational force to act when it deems it to be appropriate." *Id.* at 5. Ambassador Parrilla of Cuba warned "of the threat to the security and sovereignty of Cuba posed by this military deployment in a theatre of operations that involves our country through the presence of the United States Military Base at Guantanamo." *Id.* at 6.

Finally, Brazil abstained for two reasons. First, it questioned whether the resolution was "a worrisome departure from the principles and customary practices adopted by the United Nations as regards peace-keeping."

While some may question whether the Council's doubts were well-founded, it seems clear that Resolution 940 did not amount to the "blank check" the Government of Mexico alleged the U.N. had issued to the United States.⁴⁰¹ First, the need for Member State action seemed clear. One of the Secretary-General's reasons for recommending authorization of enforcement action by Member States was that it would take the U.N. at least three to six months to raise the necessary force itself and time was of the essence because sanctions were harming the Haitian people rather than the perpetrators of the coup and human rights violations. Thus, there was an implicit timeframe for action.⁴⁰² Second, the U.N. seems to have made an effort to make the delegation less open-ended than previous U.N. delegations of enforcement authority had been. In particular, it was significantly better regulated than the delegation in Somalia, its nearest precedent.⁴⁰³

In addition to concerns about U.S. control over whether to employ force, the Council questioned how force would be employed. Making turnabout fair play, in the Security Council's deliberations on Resolution 940, the Russian representative, Ambassador Vorontsov, perhaps recalling the Council's concerns about the CIS deployment in Abkhazia, noted that "[t]he Russian Federation attaches great importance to the total transparency of the operation."⁴⁰⁴ In response, U.S. Secretary of State Warren Christopher, when later

Id. at 10. Given Brazil's support for the early Chapter VII resolutions this argument smacked of inconsistency. Second, Brazil hid behind the absence of a regional consensus, stating that: "From the intensive consultations undertaken with our neighbors and friends, it [had] become clear that there [was] no consensus among them as to the action proposed today." *Id.* at 9. *But cf. id.* at 10 (Statement of Chinese representative, Ambassador Li Zhaoxing, objecting to the use of force). Like Brazil's second objection, China's abstention was based only on the pragmatic, not legal, ground that "China does not agree with the adoption of any means of solution based on the resort to pressure at will or even the use of force." *Id.* China did add that "resolving problems such as that of Haiti through military means does not conform with the principles enshrined in the United Nations Charter and lacks sufficient and convincing grounds." *Id.*

401. See U.N. Doc. S/PV.3413, *supra* note 400, at 5 (Mexico claiming that S.C. Res. 940 is "carte blanche"). *But see id.* at 22 (Statement of representative of New Zealand, Ambassador Keating, arguing that the "temporary nature" of the authorization is limiting, and thus not a "blank cheque").

402. See REPORT ON HAITI, *supra* note 400, ¶ 19.

403. The two-part U.N. humanitarian intervention in Somalia pursuant to S.C. Res. 794, *supra* note 69, and S.C. Res. 814, *supra* note 320, provided for a transfer of authority from a coalition force, the UNITAF, which was led by the United States, to UNOSOM II, a mission under U.N. command and control but with enforcement authority. Resolution 794, authorizing action by Member States in Somalia, merely called for reports by the Secretary-General on "attainment of the objective of establishing a secure environment so as to enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations." S.C. Res. 794, *supra* note 69, ¶ 18. This formulation led to confusion when Resolution 814 (1993) failed to determine that an "environment so as to enable" the Council to move to a "peace-keeping operation," was ever "established," but nonetheless decided to establish UNOSOM II and authorized it to "organize a prompt, smooth and phased transition from the Unified Task Force to the expanded Operation." S.C. Res. 814, *supra* note 320, ¶ 14. Nonetheless, experience in that case proved that the U.S. was inclined to turn over responsibility as soon as it could, perhaps sooner than it should have. See generally HIRSH & OAKLEY, *supra* note 321.

But in Haiti, unlike Somalia, the U.N. did not wait until after a Member State's force was deployed to adopt criteria for when it should be withdrawn. Rather, Resolution 940 itself specified a standard for determining when the follow-on United Nations Mission in Haiti (UNMIH) would take over from the U.S.-lead coalition force—namely, when "a secure and stable environment [had] been established and UNMIH [had] adequate force capability and structure to assume the full range of its functions." S.C. Res. 940, *supra* note 3, ¶ 8. Moreover, Resolution 940 explicitly provided that the determination that there was "a secure and stable environment" was to be made "by the Security Council, taking into account recommendations from the Member States of the multinational force." S.C. Res. 940, *supra* note 3, ¶ 8. One might question how much of an improvement this was over the Somalia regime, since it technically gave the intervening states, through the U.S. veto at the Security Council, the power to block transition to UNMIH. However, Resolution 940 also provided that the costs of the intervening force would not be considered expenses of the Organization. See *id.* ¶ 4 (authorizing action "on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States"). Accordingly, the intervening states would have a strong incentive to assure establishment of a secure and safe environment as soon as possible.

404. U.N. Doc. S/PV.3413, *supra* note 400, at 23.

explaining to the Council the circumstances under which coalition forces had deployed in Haiti with the consent of the de facto authorities to implement Resolution 940, emphasized the broad multilateral participation in the coalition, pointing out that "[a]n expanding coalition of 28 nations, so geographically diverse as to include Bangladesh and Bolivia, had been forged in pursuit of a common cause."⁴⁰⁵

Thus, like the ECOWAS operation in Liberia and the CIS operation in Georgia, the structure and implementation of the U.N.-authorized intervention in Haiti reflected an accommodation to pressure generated by deliberative democracy, ensuring that the intervention serve community purposes rather than simply the political interests of the regional hegemon.

5. Substantive Outcomes of Deliberative Democracy: Liberia, Georgia, and Haiti Reconsidered

Even if regional peacekeeping has, as argued above, stimulated a process of deliberative democracy leading to the consolidation and progressive development of the supranational community, it remains to be asked whether the substantive outcomes of regional collective security will facilitate the development of supranational community.⁴⁰⁶ Another way of putting the point is, what kind of values are being served by regional peacekeeping? Is a plausible conception of liberty being advanced by the interplay between existing U.N. institutions and regional organizations?

The cases described below seem to suggest that, while the Council's deliberative democracy stemmed from the argument from liberty in supranational federalism, the substantive policies it advanced reinforced the argument from community's conception of supranational federalism.

(a) Liberia

The U.N. role in Liberia was designed to permit the parties to settle their differences in a manner that reflected the popular will, despite the bitter divisions which had emerged from an essentially tribalized civil war.⁴⁰⁷ In this context, it should be noted that the U.N. urged that elections be held not under single-member districts, but instead on the basis of proportional representation.⁴⁰⁸

405. U.N. SCOR, 49th Yr., 3429th mtg. at 3, U.N. Doc. S/PV.3429 (1994).

406. As Paul Brest has argued, an account of a legitimate political process must also articulate the substantive values that process will advance. See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 134-37 (1981); see also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 365 n.71, 368-80 (making the same point about federalism in evaluating a process theory of the 10th Amendment).

407. See, e.g., UNITED NATIONS, SECURITY COUNCIL, FOURTH PROGRESS REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶ 12, U.N. Doc. S/1994/588 (1994)(discussing the increasingly tribal basis of the civil war, causing divisions even within the various rebel factions).

408. See UNITED NATIONS, SECURITY COUNCIL, THIRD PROGRESS REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN LIBERIA, ¶¶ 12-16, U.N. Doc. S/1994/463 (1994) (discussing the electoral process).

While the U.N. recommendations seem to have been driven primarily by financial considerations,⁴⁰⁹ their function in encouraging particular forms of democratic politics is still important. Although it is difficult to make generalizations in this area, the pressure in favor of proportional representation arguably reinforces the argument from community's corporatist tendencies; single-member districts drawn to avoid any particular tribe's having a majority would encourage coalition-building among tribes in Liberia.⁴¹⁰

On the other hand, if groups are territorially divided—a result of the Liberian civil war—it may be impossible to draw such districts.⁴¹¹ In that case, single-member districts would reinforce corporatist politics at a local level. Under those circumstances, particularly if no single group is numerically dominant, the proportional method might, by nationalizing politics and ensuring that at the national level no single group secures a majority, be the next-best solution in facilitating the emergence of pluralist politics at least at the national level.⁴¹²

(b) Georgia

In addition to the procedural goals described above in relation to the role of the regional organization, the U.N. also pursued substantive goals in Georgia in support of self-determination. Resolution 876 had "[a]ffirm[ed] the sovereignty and territorial integrity" of Georgia.⁴¹³ But the January 13, 1994 communique of the parties to the civil war noted that: "The United Nations, the CSCE and the Russian Federation call upon the parties to proceed from the need to observe the territorial integrity of Georgia and fully to ensure the interests of the entire multinational population of Abkazia, these being the fundamental principles of a comprehensive settlement."⁴¹⁴ Yet the U.N. seems to have attached a special meaning to Georgia's "territorial integrity." In fact, the U.N.'s commitment to minority autonomy may have bordered on support for secession.

The problem of Abkazan autonomy was complicated by demographic shifts in Abkazan territory during the civil war. The Georgian representative, Ambassador Chkheidze, speaking to the Security Council, sought to rely on this development to undercut U.N. pressure for some form of Abkazan autonomy, noting that "[w]e realize that determination of the political status of Abkazia, respecting the sovereignty and territorial

409. See *id.* ¶ 16 (the proposal was presented, however, as technical in nature, on the basis that national elections could be held within the agreed time-frame only if the proportional representation method were used).

410. Ordinarily single-member districting is premised, under the argument from liberty, on the possibility of pluralist politics; multimember districts and proportional representation are based, under the argument from community, on the inevitability of corporatist politics. Compare *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) with Guinier, *supra* note 202.

411. See *Liberia*, U.S. Dep't St. Dispatch, Feb. 1, 1991 (1990 Human Rights Report) (hundreds of thousands moving after rebel massacres); Peter Da Costa, *Liberia: Opening of Road Brings More Headaches*, INTER PRESS, Jan. 18, 1992 (reporting that about 800,000 caught behind rebel controlled area created "two Liberias"); *Monrovia Mourns Massacre Victims*, AGENCE FRANCE PRESSE, June 11, 1993 (stating that a quarter of a million people were displaced); *Locusts a Major Threat to Crops in Horn of Africa*, AGENCE FRANCE PRESSE, July 14, 1993 (reporting that civil strife displaces more than a million people).

412. See Guinier, *supra* note 202, at 1150 (defending proportional or semi-proportional representation as one conception of pluralism); but see Wolfe, *supra* note 211 (taking a narrow view of pluralism so as to ensure that it is not confused with corporatism).

413. S.C. Res. 876, *supra* note 367, para. 1.

414. LETTER DATED 13 JANUARY 1994, *supra* note 370, at 4 para. 5; see also U.N. Doc. S/PV.3332, *supra* note 369, at 14 (China representative reiterating commitment to "respect the independence, sovereignty and territorial integrity of Georgia," and adding that "the interests of the multi-ethnic inhabitants of Abkazia should also be guaranteed").

integrity of the Republic of Georgia, is the key to an overall political settlement," but arguing that the armed Abkazian minority should not be allowed to turn itself into a false majority through ethnic cleansing policies that made a mockery of self-determination.⁴¹⁵ Thus, the Council "[c]ondemn[ed] any attempts to change the demographic composition of Abkazia, Republic of Georgia, including by repopulating it with persons not previously resident there."⁴¹⁶

This moral dilemma did not impede the U.N. Secretariat from seeking to facilitate secession. At the negotiations in Geneva, the Secretary-General's Special Envoy, Edouard Brunner, submitted a document to the parties entitled "Proposals for Political and Legal Elements for a Comprehensive Settlement of the Georgian/Abkaz Conflict," envisioning a "union State" under which certain defined areas of "joint competence" would be exercised.⁴¹⁷ But even "[w]ithin areas of joint competence, issues of interest specific to Abkazia [would] be decided only with the consent of Abkazia." And "[o]utside areas of joint competence, Abkazia [would] enjoy the full measure of state power, including measures to ensure public order."⁴¹⁸ More significantly, Abkazia would have its own "State symbols, such as anthem, emblem and flag," and, "[i]n the areas of its competence," would have "the right to conclude international treaties."⁴¹⁹ It cannot be denied that these proposals did not fit within a traditional understanding of respect for the sovereignty and territorial integrity

415. U.N. Doc. S/PV.3332, *supra* note 369, at 3–4. Ambassador Chkheidze added that "an urgent resolution of the refugee problem is the key to the determination of the political status of Abkazia itself." *Id.* at 4 (Statement of Georgian Ambassador Chkheidze made pursuant to provisional rule of procedure 37). *See also id.* at 16–17 (Statement of Czech Republic representative: "[F]orces from among the Abkazians of Georgia, who had constituted a minority even in their own region, made use of the weakness of the Georgian central Government and employed force of arms in an effort to secede. In the process, some 300,000 inhabitants of Abkazia—more than half the total population—were forced from their homes.").

416. S.C. Res. 896, *supra* note 367, ¶ 12. In the debate on Resolution 906, which reaffirmed the Council's "respect" for "the sovereignty and territorial integrity of the Republic of Georgia," and urged the parties to "achieve substantive progress towards a political settlement, including on the political status of Abkazia, respecting fully the sovereignty and territorial integrity of the Republic of Georgia," S.C. Res. 906, U.N. SCOR, 49th Yr., Res. & Dec., at 2–3, ¶¶ 2, 4, U.N. Doc. S/INF/50 (1994), the norm of *uti possidetis juris* was implicitly invoked by states concerned with the threat of secession. *See supra* note 286, for discussion of the role of *uti possidetis juris* as a counterweight to an expanded doctrine of self-determination. The Czech representative, whose country had only recently divided from Slovakia, noted argued that forced migration and repopulation was:

[A]n issue that transcends Georgia itself: several former states that have disintegrated in recent years have bequeathed us the legacy of former internal borders. The issue of the borders between the former constituent parts of these States turning into international borders has become a burning issue. Georgia is an additional example of the dangers inherent in efforts to change these borders by force.

....

... [As to] the politics of demographics... [t]he important thing, though, is that all inhabitants of Abkazia *ante bellum* should have such a say. We have always recognized the multi-ethnic character Abkazia has had in the past. We find abhorrent any efforts to change its ethnic composition by force, in order to pursue ulterior political motives.

U.N. SCOR, 49th Yr., 3354th mtg. at 4, U.N. Doc. S/PV.3354 (1994). The Nigerian representative added: "[M]y Government fully endorses the need for the parties to the conflict and all others concerned to respect another principle that is very dear to us in Africa: the sovereignty and territorial integrity of States . . ." *Id.* at 5.

417. *See SITUATION IN ABKAZIA*, *supra* note 375, Annex 2, ¶ 3 [hereinafter *Special Envoy's Proposals*]. It is possible the Special Envoy had in mind the model employed for the Confederation of the Bosnian-Herzegovina Federation and Croatia under the auspices of the International Conference on Yugoslavia. *See Bosnia and Herzegovina—Croatia: Preliminary Agreement Concerning the Establishment of a Confederation*, 33 I.L.M. 605 (1994); BOSNIA & HERZEGOVINA CONST., reprinted in 33 I.L.M. 740 (1994), as amended 33 I.L.M. 781 (1994).

418. *Special Envoy's Proposals*, *supra* note 417, Annex 2, ¶¶ 3, 4.

419. *Id.* Annex 2, ¶¶ 2, 5.

of Georgia. The Special Envoy's Proposals in fact envisioned far greater autonomy and international capacity for Abkazia than had previously been accepted by Georgia.⁴²⁰ The Secretary-General, arguably aligning the Secretariat and the institutional prestige of the U.N. behind a secessionist solution to the Georgian civil war, seemed to approve these efforts when he reported to the Council that "Abkazia would be a subject with sovereign rights within the framework of a union State."⁴²¹ The corporatist tendencies of the U.N.'s role thus seem to be undeniable.

(c) Haiti

Before untangling the substantive values served by the intervention in Haiti, we need to critically reconsider the temptation to give the broadest possible reading to the U.N. intervention in Haiti—a reading that suggests the possible emergence of a pro-democratic community of states and peoples underlying the supranational constitution.⁴²²

In this tantalizing vision, the Council's reliance on the constitutive theory of recognition in giving effect to the pronouncements of the "legitimate" government might be understood to point to the power of the international community to set the terms for entry, signalling the emergence of a constitutional order under which collective intervention would derive from the competence of the supranational community to bar admission of states that did not conform their practices to the community will.⁴²³

But settled, older precedents had suggested that recognition could not serve generally as a legal basis for forcible intervention. Of course, the constitutive theory of recognition had always found some adherents in the special case of decolonization.⁴²⁴ But when employed by some foreign ministries,⁴²⁵ it was widely criticized as a pretext for unlawful intervention

420. See APRIL 4 POLITICAL DECLARATION, *supra* note 372. The April 4 Declaration simply recognized that Abkazia would have its "own Constitution and legislation and appropriate State symbols," *id.* ¶ 6, and identified areas of joint competence, *id.* ¶ 7, leaving to be determined later the precise constitutional arrangements between Georgia and Abkazia.

421. SITUATION IN ABKAZIA, *supra* note 375, ¶ 15.

422. Early in the debate on Haiti, for example, the Austrian representative to the Security Council quoted the Secretary-General's remark in an address on April 24, 1991 at the University of Bordeaux that: "We are clearly witnessing what is probably an irresistible shift in public attitudes toward the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents." U.N. Doc. S/PV.3011, *supra* note 383, at 24–25. The Austrian Ambassador added, "The Council, with its new-found determination, can make an important contribution." *Id.* Moreover, in the aftermath of the failed coup of August 1991 in the Soviet Union, the then Soviet representative noted that "[m]embers will understand why the Soviet people reacted with concern and alarm to news of the anti-Government putsch in Haiti." *Id.* at 29–30 (Statement of Russia's Ambassador Vorontsov).

423. See Part IV (particularly notes 158–60, discussing developments in collective recognition practice).

424. For example, in the cases of the proclamation of independence by the Rhodesian "racist settler minority" and the "continued unlawful presence" in Namibia of South Africa notwithstanding the termination of the mandate, the United Nations created legal duties for states not to recognize the acts of unlawful authorities. Continued presence of South Africa in Namibia, *supra* note 41 (requiring states not to recognize the continued unlawful occupation of Namibia by South Africa, except for a limited category of administrative acts solely for the benefits of Namibians); S.C.Res. 217, *supra* note 300 (Resolution Concerning Southern Rhodesia). See generally *id.* para. 6 ("Calls upon all states not to recognize this illegal authority and not to entertain any diplomatic or other relations with it.").

425. See L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 19–30* (1978) (locating the Wilsonian doctrine of constitutional legitimacy as a precondition for recognition of governments in the Union response during the American Civil War to the Confederacy's assertion of independence); see also H. LAUTERPACHT, *supra* note 147, at 115–16.

during the Cold War.⁴²⁶ With the end of the Cold War, however, the prudential reasons for a declaratory theory of recognition were undercut, since presumably the Great Powers would intervene only on the basis of Security Council authorization. International criteria on recognition might thus be available.⁴²⁷ With the transformation of United Nations law worked by the *Agenda for Peace*, the legality and legitimacy of the international community's exercise of the right of recognition could no longer be questioned. How the Council would use its new power of recognition would be the more interesting question.

The case of Yugoslavia seems to suggest that the supranational community did indeed have the power to employ recognition as a tool in a process of community governance, but for non-pluralist ends. Indeed, the U.N., in coordination with the EC, employed recognition as an instrument of conflict resolution in the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY).⁴²⁸ Serbia/Montenegro made a procedural challenge to the

426. It seems to have been the settled view even before the Cold War began, and certainly thereafter, that recognition of a government not in de facto control of the sufficient people and territory to warrant recognition would be considered a form of intervention. See CHARLES HYDE, *INTERNATIONAL LAW* 152-53 (2d rev. ed. 1946); Franck, *Who Killed Article 2(4)?*, *supra* note 322. Franck noted that very often the determination of whether use of force is collective self-defense or aggression "depends upon whether the supported regime really constituted the effective government, or was merely a fiction being propped up primarily for the purposes of legitimizing 'help' from outside. *Id.* at 817. Thus he added:

In the absence of an objective international system of recognition of governments and an international system for determining which party to a dispute is the aggressor and which the victim, Article 51 is a wide-open invitation to the great Powers to engage each other in limited wars fought vicariously on borrowed terrain and with others' lives.

Id. at 818. The employment of recognition to justify use of force to during the Cold War was seen as a breach not only of the Charter's ban on use of force under Article 2(4), except in accordance with the right of individual or collective self-defense under Article 51, but also of the duty of non-intervention set forth in Article 2(7).

Nonetheless, the superpowers repeatedly relied on nonrecognition theory to defend their activities during the Cold War. For example, in the years the United States was carrying out its program of "appropriate and effective" assistance to the UNITA rebels in Angola, it never expressly recognized the independent state of Angola or the MPLA authorities in Luanda as its government. Similarly, the U.S. relied in part on the assent of a recognized authority in Grenada. See Jeane J. Kirkpatrick, *Doctrine of Moral Equivalence*, DEP'T ST. BULL., Aug. 1984, at 57 (relying in part on the invitation of Governor-General of Grenada); *but see* Edward Gordon et al., *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAW. 331 (1984) (concluding the U.S. action rested on an unsteady legal foundation).

Moreover, these patterns of conduct seemed to carry over to other contexts even after the Cold War had begun to fade to other contexts. In its explanation for its use of force in Panama in December 1989, the Bush Administration relied in part on the fact that U.S. deployment was "welcomed by the democratically elected government of Panama." COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT ON THE DEVELOPMENT CONCERNING THE DEPLOYMENT OF UNITED STATES FORCES TO PANAMA ON DECEMBER 20, 1989, H.R. Doc. No. 127, 101st Cong., 2d Sess. (1990); *reprinted in* HENKIN ET AL., *supra* note 69, at 924-25. The Administration had previously derecognized the Noriega government and instead recognized the Panamanian government he had deposed. Under section 25(b) of the Federal Reserve Act, the effect of the Administration's policy of recognition was to deny General Noriega access to Panamanian Government funds derived from the Panama Canal located in U.S. accounts. 12 U.S.C.A. § 632 (West 1995). See THOMAS CAROLTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* 172-73, 282 n.46 (1991). For views on the U.S. action, see Ved P. Nanda, *Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists*, 84 AM. J. INT'L L. 494 (1990). Accordingly, international and scholarly reaction to the United States invasion of Panama was severely critical when the United States appeared to rely on recognition theory to defend its conduct. *But see supra* note 69 (arguing that unilateral intervention for humanitarian reasons in the Panama case may have played a role in ultimately legitimizing collective intervention in Haiti).

427. See DUGARD, *supra* note 147. For a discussion of *jus cogens* norms, particularly self-determination, as a constraint on the United Nations exercise of their collective responsibility, see *id.* at 123-63.

428. See WOODWARD, *supra* note 293, at 392. The EC articulated criteria for recognition of the new states, focusing especially on the treatment of minorities. Applications were then considered by the Badinter Commission, an Arbitration Committee of the EC established as part of the Conference on Yugoslavia convened

employment of these criteria, which the Badinter Commission denied on the narrow ground that Serbia/Montenegro had consented to the overall dispute resolution process of which the criteria were a part.⁴²⁹ But given the artificiality of that claim of actual consent, it seemed the better rationale was the supranational community's collective judgment as a matter of world governance that it was competent to apply law to questions arising out of the dissolution of former Yugoslavia.⁴³⁰ Admittedly, until the summer of 1995 the Security Council offered only limited protection to the entities the United Nations has deemed part of the Charter community.⁴³¹ But that does not undercut the conclusion that, in its early recognition of new states arising out of the SFRY, the Council employed its new constitutional powers to protect minority group rights in a way that furthered the argument from community.

Similarly, the Haiti case demonstrates the competence of the supranational community to enforce a particular conception of domestic order. But it is not as clear as one might believe at first glance that pluralist democracy was at stake. Rather, justifications that were either unrelated to or even opposing pluralism were at work.

The primary justification for the U.N.-authorized intervention in Haiti was of course to reinstall the deposed government of president Jean-Bertrand Aristide. Significantly, the U.N. played a critical role in Aristide's initial ascension to power through the U.N. monitoring of the election that catapulted him to office.⁴³² Accordingly, the General

pursuant to the Brioni Accord of July 7, 1991. See Weller, *supra* note 148, at 588–89. The criteria were then applied to yield answers to the question of international recognition. See Badinter Commission, Opinion 4–7 10, 31 I.L.M. 1501–26 (1992) (recommending recognition of the new states other than the Federal Republic of Yugoslavia (Serbia/Montenegro)), which had declined to apply because it maintained it was the continuation of the SFRY and thus its automatic successor at the General Assembly and other U.N. bodies); but see Letter from Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs, to Kenneth Dadzie, Under-Secretary-General, United Nations Conference on Trade and Development (UNCTAD) (Sept. 29, 1992), *reprinted in* Scharf, *supra* note 148, at 60–61 (taking the position, in interpreting S.C. Res. 777, *supra* note 148, that the resolution “does not take away the right of Yugoslavia to participate in the work of the organs other than Assembly bodies.”).

429. Serbia/Montenegro challenged the competence of the Commission to address the questions put before it by the Conference on Yugoslavia. In its interlocutory award of July 4, 1992, the Commission relied in part on Serbia/Montenegro's consent to the process under the Brioni Accord of July 7, 1991. See *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, *supra* note 286, at 1518–21 (interlocutory decision). One wonders how competence to render a decision that an entity has no international legal status can be predicated on the consent of that entity which, under the decision, has no capacity to consent.

430. The Badinter Commission's recommendations, with the exception of the recognition of Macedonia, see Weller, *supra* note 148, at 593–94, were immediately followed by the EC and the U.S. and charted the course of U.N. policy on questions of membership, *id.* at 586–96, even with respect to the highly contentious case of Serbia/Montenegro. See S.C. Res. 777, *supra* note 148 (reaffirming that Serbia/Montenegro was not the continuation or automatic successor of the former Yugoslavia). Thus, what otherwise might have been seen as a “premature recognition”—particularly of Bosnia-Herzegovina, which by any reasonable standard was in the throes of a civil war requiring international neutrality under the traditional law of belligerency, see, e.g., HYDE, *supra* note 426 at 153 (“[R]ecognition to a country still in the throes of warfare against the parent State . . . constitutes participation in the conflict.”)—now seemed to have been legitimated by the international community's right to intervene to assure the protection of minority group rights.

431. The scope of this protection in the Balkans was limited, however, to an essentially humanitarian mission. As the Secretary-General observed: “It will be clear from the . . . Security Council's references to Chapter VII that the Security Council did not initially contemplate an enforcement role for the Force in Bosnia and Herzegovina.” See REPORT ON RES. 982 & 987, *supra* note 306, ¶ 56. See *infra* note 470 (discussion of enhanced supranational intervention in 1995).

432. See U.N. Doc. S/PV.3011, *supra* note 383, at 51. (Statement of Canadian representative, Ambassador Fortier). The Canadian representative stated:

I need not remind the Security Council that it was the United Nations, through the United Nations Observer Group for the Verification of the Elections in Haiti (ONUVEH) and working in concert

Assembly's complaint that "despite the efforts of the international community, the legitimate government of President Jean-Bertrand Aristide has not yet been re-established," and its call for the Secretary-General to "take all necessary measures in order to assist . . . in the solution of the Haitian crisis" and for states to impose sanctions,⁴³³ reflect the Assembly's institutional commitment to the survival of the regime it had midwived into power.⁴³⁴ Neither the Assembly nor the Council had made a broader commitment to ensuring democracy everywhere.

But in addition to this institutional rationale for the intervention in Haiti, the Council was concerned simply about humanitarian issues. In particular, the Council condemned "extra-judicial killings, arbitrary arrests, illegal detentions, abductions, rape and enforced disappearances, the continued denial of freedom of expression, and the impunity with which armed civilians have been able to operate and continue operating."⁴³⁵ The continuation of these incidents and the expulsion of the joint United Nations/Organization of American States International Civilian Mission (MICIVIH), which had monitored human rights conditions in Haiti with the consent of the de facto authorities, appears to have presented the Security Council with *fait accompli*, requiring it either to abandon its rhetoric or take further action to ensure the protection of human rights in Haiti.⁴³⁶

Finally, it has been argued that the U.N. intervention can be explained in terms of the historic patterns of racism in Haiti, under which a primarily white ruling upper-class had seen its command of state institutions finally toppled with the election of President Aristide.⁴³⁷ U.N.-authorized enforcement action was, then, less a case of pro-democratic intervention than an effort to wipe out the last vestiges of colonialism in the Western Hemisphere—ironically enough, just as apartheid finally was being dethroned in South

with the Organization of American States (OAS), that monitored the holding of free and fair elections that resulted in President Aristide's assuming office earlier this year.

Id.

433. G.A. Res. 47, U.N. GAOR, 47th Sess., Supp. No. 49, at 21, pmbl. para. 5, ¶¶ 6, 8, U.N. Doc. A/47/49 (1992).

434. *Electoral Assistance to Haiti*, G.A. Res. 45, U.N. GAOR, 45th Sess., Supp. No. 49, at 12, A/45/490 (1990) (establishing ONUVEH). The Security Council had also concurred in this action by the General Assembly, accepting the Assembly's competence to do so because ONUVEH involved only election monitoring. See UNITED NATIONS, SECURITY COUNCIL, LETTER DATED 5 OCTOBER 1990 FROM THE PRESIDENT OF THE SECURITY COUNCIL ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. S/21847 (1990); see also RATNER, *THE NEW UN PEACEKEEPING*, *supra* note 304, at 66.

435. S.C. Res. 917, *supra* note 398, pmbl. para. 11.

436. See U.N. SCOR, 49th Yr., 3403d mtg., U.N. Doc. S/PV.3403 (1994) (emergency meeting of the Security Council held in response to developments in Haiti). The President of the Security Council, authorized by the Council, condemned the expulsion of MICIVIH, "whose work has the highest approbation of the Council and whose mandate was extended by the United Nations General Assembly on 8 July 1994 (A/RES/48/27 B)," asserting that "[t]his provocative behavior directly affects the peace and security of the region," and warning that "this latest action by the Haitian military and the illegal de facto regime further reinforces the continued determination of the Security Council to bring about a rapid and definitive solution to this crisis." *Id.* Indeed, the Argentine representative, Ambassador Cardenas, during the Council's debate on the authorization for use of force to restore the Aristide government, noted that:

Between the end of January and the beginning of April 1994, the International Civilian Mission in Haiti (MICIVIH) published 11 press releases on the deterioration of the human rights situation, and specifically the increase in the number of extrajudicial executions, suspicious deaths and arbitrary detentions, the many cases of rape, the wave of repression in the provinces, and the abductions and clandestine detention centers in Port-au-Prince and the surrounding areas.

S/PV.3413, *supra* note 400, at 16.

437. See Amy Wilentz, *Love and Haiti: Can Aristide Come Home Now?*, NEW REPUBLIC, July 5, 1993, at 18 (discussing U.S. military's historic relationship with the white Creole aristocracy and the threat to its power posed by President Aristide).

Africa.⁴³⁸ In sum, the substantive values served by the intervention in Haiti cannot be expressed pithily as pro-democratic intervention. Rather, humanitarian and political claims of the black majority in Haiti appealed to themes found in the *Agenda for Peace*.

While the intervention was not, strictly speaking, an action to protect a minority—since the intervention defended the rights of a repressed majority rather than an enslaved minority—neither was it expressly to ensure the survival of communities, along the lines of the supranational response to the situation in former Yugoslavia. Yet intervention to overturn the historic pattern of repression of the black majority in Haiti may have fit within the framework of the *Agenda for Peace* as well as the corporatist values implicated in the U.N. interventions in Liberia and Georgia. Thus, surprisingly, the Council's deliberative democracy may have reinforced the argument from community for the supranational constitution.

6. Public Acceptance of the New Collective Intervention

The legitimacy of the exercise of power by the Member States and regional organizations places in relief the competing centralizing and decentralizing tendencies of the *Agenda for Peace*. On one hand, supranational constitutional authority has been increased. On the other, minority group and national rights within states are to be protected. The link between the two has been the activation of regional organizations. But this has necessarily entailed the risk of regional hegemony, in which Member States may well be tempted to exceed the authorization granted by the Council.⁴³⁹ As Secretary-General Perez de Cuellar opined in his valedictory report, "Governments can, and do, expose themselves to charges of deliberate bias; the United Nations cannot."⁴⁴⁰ Secretary-General Boutros Boutros-Ghali, author of the *Agenda for Peace*, also recognized that delegation by the Council to a state or group of states to take enforcement action "can also create the impression amongst the parties that the operation is serving the policy objectives of the contributing Governments rather than the collective will of the United Nations as formulated by the Security Council. Such impressions inevitably undermine an operation's legitimacy and effectiveness."⁴⁴¹

The United Nations' decision to join, and thus legitimize, the Russian Federation's peacekeeping operation in Georgia is a textbook example of the development of this kind of impression. It was alleged that the U.S. and Russia entered into a secret pact, under which Russia promised not to veto a Security Council resolution authorizing the use of

438. See *The Triumph of Moderation*, *ECONOMIST*, May 7, 1994, at 43 (reporting Nelson Mandela and the African National Congress' electoral triumph in South Africa's first non-racial elections).

439. See SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 80 ("There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them.")

440. The Secretary-General added, "any international action taken for protecting human rights must be based on a decision taken in accordance with the Charter of the United Nations. It must not be a unilateral act." *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 46th Sess., Supp. No. 1, at 11, U.N. Doc. A/46/1 (1991).

441. See SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 41. This concern also was expressed at the recent Congress on Public International Law, where participants actions by the Security Council under Chapter VII "reflected the evolution of international law or the application of selective political power." See Congress on Public International Law, U.N. Doc. L/2703 (1995) (U.N. publication forthcoming). Moreover, even if Member States and regional organizations intervene on behalf of the international community within the scope of the authority properly made available by the Security Council, the intervention might also be simultaneously in their direct national interest, perhaps engendering the same perception that improperly motivated intervention would generate.

force to restore Jean-Bertrand Aristide's government in Haiti, in return for which the U.S. promised not to veto the Security Council resolution on Georgia.⁴⁴² Thus, if this case is an omen of the future, a perception, if not the reality, of impartiality by the Security Council (which was emphasized in the *Agenda for Peace* particularly with respect to the conduct of U.N. peace operations) may well be severely undercut when a regional organization is involved. It is too early to tell whether the public will realize that deliberative democracy actually has contained the self-interest of regional hegemons in the recent U.N. peacekeeping and enforcement operations that are delegated, or involve cooperation with, Chapter VIII regional organizations.

But even though there is a broad understanding that deliberative democracy is alive and well at the Security Council, there would still be questions of legitimacy, since the argument from community has seemed to play a greater role than the argument from liberty in defining the substantive policies advanced by the supranational community in its interventions in the domestic jurisdiction of states. Substantive policies built around the argument from community are not adapted to address individualized claims of justice based on moral conceptions.⁴⁴³ Even the Secretary-General may have conceded this when, ignoring the argument from liberty's demand that the moral judgment of the supranational

442. See Weymouth, *supra* note 343 (reporting that Russian ambassador to the United Nations informally said that without U.N. endorsement for Russia in Georgia, "Moscow would veto a resolution authorizing the dispatch of troops to Haiti"); *A U.N. License to Invade Haiti*, N.Y. TIMES, Aug. 2, 1994, at A20 ("Having taken its lumps trying to be a world police force, the U.N. has now fallen into the unhealthy habit of licensing great-power spheres of influence. In recent weeks the Security Council has commissioned France to send troops to Rwanda and endorsed Russia's 'peacekeepers' in Georgia. Now the U.S. is authorized to lead an invasion of Haiti. Such crude power politics damages the U.N.'s standing as an organization valuing the sovereignty of all its member states."); Daniel Williams, *Powers Assert Influence In Peacekeeping Roles; Independent Missions Lack U.N.'s Idealism*, WASH. POST, July 30, 1994, at A12 (reporting that U.S. Ambassador to the U.N. Madeleine Albright "calls the phenomenon 'spheres-of-influence peacekeeping'" and that, on background, one U.S. official noted that, under the U.S. agreement to Moscow's intervention in Georgia, "At a minimum, the principle of neutrality is being diluted."); Rowland Evans & Robert Novak, *Russian Bombs*, WASH. POST, Aug. 4, 1994, at A31 (reporting that Vladimir Shumeiko, Speaker of the upper house of the Russian Parliament, told Washington officials that "if the United States expects U.N. approval to invade sovereign states such as Haiti, Clinton must understand that 'we have the same right to expect genuine support of our efforts to regulate conflicts' in the former Soviet Union"); Mitch McConnell, *Will U.S. Pay 'Hidden Cost' for Haiti?*, CHI. TRIB., Oct. 4, 1994, at 21 (U.S. Senator repeating Weymouth's allegation as "widespread speculation in Washington policy circles, supported by commentary from Moscow" that Russia traded Haiti for a sphere of influence in the new independent states); Charles Krauthammer, *Our Sphere, Their Sphere; The United States Has Some Areas of Influence It Shouldn't Give Up*, WASH. POST, Oct. 7, 1994, A25 (reporting that President Clinton implicitly acknowledged existence of Russian sphere of influence by acknowledging "that Russia would be involved—militarily involved—with its neighbors 'just like the United States has been involved in the last several years in Panama and Grenada near our area.'"). The remarkable feature of Clinton's statement is that both in Panama and Grenada the U.S. intervened unilaterally and was severely criticized at the U.N. and elsewhere for doing so.

Very few columnists seemed to disbelieve, or even remain open-minded, about the "secret pact" allegation. See, e.g., Stephen S. Rosenfeld, *Why We Need a Democratic Russia*, WASH. POST, Sept. 30, 1994, at A29 ("Washington insists that the United Nations make ready to subsidize a second-stage Haiti intervention for which Russia would partly pay. But it lets the U.N. duck Russian appeals for a parallel intervention in Georgia's Abkhazia. Russia is criticized for its policy there, even as the United States does far pushier things in—ah, yes—Haiti, where Russia goes along."); and Jim Hoagland, *Behind the Bear Hugs*, WASH. POST, Oct. 3, 1994, at A19 ("But the United States opposes the United Nations paying for a Russian-dominated force in Georgia, despite widespread impressions that Christopher and Kozyrev had struck a deal last summer when the Russians agreed to vote for a Security Council resolution that authorized American military action in Haiti. American officials deny there was a deal on peace-keeping in Georgia and cite good reasons why the United States will not go along with the Russian proposals. They omit the kind of reassuring music that would have gone with such lyrics a year ago.").

443. See *supra* notes 89 and 129–37; see also Burton, *supra* note 158, at 760 (Burton's typology of law as a form of practical reason treats a moral community as the highest form of legal system); see also FRANK, *THE POWER OF LEGITIMACY*, *supra* note 69, at 150–82 (excluding justice concerns from the question of legitimacy in the international system as it is currently constituted).

community be expressed, he stated that the "purpose" of sanctions under Article 41 of the Charter "is to modify the behavior of a party that is threatening international peace and security and not to punish or otherwise exact retribution."⁴⁴⁴ This justification for the employment of the coercive power of the community, utilitarian deterrence, is far less ambitious than one based on the expression of the moral judgment of the community.⁴⁴⁵

C. *The Argument from Utility in the Federalist Supranational Constitution: Sharing the Price of Peace*

The argument from utility, despite its moral poverty, may well have powerful implications for the management and financing of collective intervention under Security Council auspices. Under Article 50 of the Charter, Member States economically affected by participating in enforcement measures may request, but have no right to receive, compensation for their efforts.⁴⁴⁶ But this provision cannot be read without understanding its relation to Article 49, which requires Member States to cooperate in the U.N.'s efforts in collective enforcement.⁴⁴⁷

1. A New Redistributive Principle

Given the expansion of powers of the Security Council entailed in the *Agenda for Peace*, the Secretary-General added that "it is important that States confronted with special economic problems [resulting from the imposition of sanctions under Article 41] not only have the right to consult the Security Council regarding such problems, as Article 50 provides, but also have a realistic possibility of having their difficulties addressed."⁴⁴⁸

444. SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 66. The Security Council endorsed this view. See STATEMENT BY THE PRESIDENT OF THE SECURITY COUNCIL, *supra* note 343, at 4 ("[T]he object of economic sanctions is not to punish but to modify the behaviour of the country or party which represents a threat to international peace and security."). See also KELSEN, *supra* note 71, at 739 (noting that none of the provisions relating to enforcement action calls for action against a member state for violating any of its obligations under the Charter).

445. Even the Secretary-General himself seemed to recognize the revolution he had wrought still had some way to go when, at the Congress on Public International Law, he said:

International society . . . was, for the most part, a place for exchanges between separate and unconnected States which identified only to a very limited extent with a shared heritage of universal values.

It was because there was no collective consciousness transcending all frontier that there was no single law-making body, a world government, a permanent and compulsory jurisdiction or a supranational organization—not the other way around as was all too often thought

[Yet as] a result of the sudden acceleration in the pace of change, a certain number of principles which, in the past, were the foundation for international society had become outdated or obsolete . . . We must therefore, and as a matter of urgency, rethink the rules of our collective future and attempt to instill, if not a moral code, at least a minimum rationality into the behavior of the key social actors.

See Congress on Public International Law, U.N. Doc. L/2712 (1995) (U.N. publication forthcoming).

446. Article 50 states: "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems." U.N. CHARTER art. 50.

447. U.N. CHARTER art. 49 ("The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.") (emphasis added).

448. AGENDA FOR PEACE, *supra* note 15, ¶ 41. In his report on *Development and International Economic Cooperation: An Agenda for Development*, the Secretary-General added that "[t]he Security Council, through the

The Secretary-General's claim recalls the earliest vision of the drafters of the Charter. The negotiating history reveals that the Dumbarton Oaks draft was revised at San Francisco specifically to ensure that states were not entitled to assistance, but merely to request assistance, under what became Article 50.⁴⁴⁹ Yet it was also the view of the Conference Committee considering what later became Article 50 that it would apply not only to measures decided upon by the Security Council but also to collective measures recommended by the General Assembly.⁴⁵⁰ Indeed, it was recognized that Article 50's meaning was irrevocably tied to the collective security provisions of the Charter as a whole.⁴⁵¹

The Secretary-General's proposal has received, however, a mixed reception. It has been endorsed by the General Assembly, which characterized the task of "finding solutions to the special economic problems of other Member States when preventive or enforcement measures are decided upon by the Security Council" as a question of examining "ways to implement Article 50 of the Charter."⁴⁵² The Security Council took a major step in the direction of recognizing the linkage between its enforcement powers and Article 50 in Resolution 917 imposing comprehensive economic sanctions against the *de facto* authorities in Haiti when the Council requested its Committee on Haitian sanctions to "examine possible requests for assistance under the provisions of Article 50 of the Charter of the United Nations and to make recommendations to the President of the Security Council for appropriate action."⁴⁵³ Nonetheless, the Security Council appears to have demurred to the Secretary-General's proposal, inviting him instead to seek a solution through international financial institutions, which in turn have recommended employment of "existing mandates for the support of countries facing negative external shocks and consequent balance-of-payments difficulties."⁴⁵⁴

provisions of Chapter VII, can adversely affect the course of development within States to which sanctions apply, as well as in neighbouring and other States." UNITED NATIONS, GENERAL ASSEMBLY, DEVELOPMENT AND INTERNATIONAL ECONOMIC COOPERATION: AN AGENDA FOR DEVELOPMENT, Agenda Item 91, para. 143, U.N. Doc. A/48/935 (1994).

449. See GOODRICH ET AL., *supra* note 38, at 341 (citations omitted).

450. *Id.*

451. As Goodrich observes: "Noting the failure of the League of Nations to solve this problem in connection with the sanctions against Italy, the Committee emphasized the direct relationship between the readiness of members to take collective measures and the establishment of arrangements to distribute the burdens thereof in an equitable manner." GOODRICH ET AL., *supra* note 38, at 341-42 (citations omitted).

452. G.A. Res 47/120B, *supra* note 330, at 5.

453. S.C. Res. 917, *supra* note 398, ¶ 14(g). As the representative from Spain argued:

It is important to recall that the effectiveness of the sanctions will also depend on the scrupulous compliance by States with the resolutions of this Council. As in other cases, it must be recognized that the neighboring countries will have to make a special effort and suffer considerable economic damage. For that reason, it is natural that the draft resolution we are about to adopt should provide for the consideration of requests for assistance under Article 50 of the United Nations Charter.

UNITED NATIONS SECURITY COUNCIL, 3376th mtg. at 6, U.N. Doc. S/PV. 3376 (1994).

454. SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 74. Dissatisfied with this non-constitutional solution to a constitutional problem, the Secretary-General has suggested the "establishment of a mechanism" to: "assess, at the request of the Security Council, and before sanctions are imposed, their potential impact on the target country and on third countries"; "monitor application of sanctions"; "measure their effects in order to enable the Security Council to fine tune them with a view to maximizing their political impact and minimizing collateral damage"; "ensure the delivery of humanitarian assistance to vulnerable groups"; and "explore ways of assisting Member States that are suffering collateral damage and to evaluate claims submitted by such States under Article 50." *Id.* ¶ 75. The Secretary-General added that "Member States will have to give the proposal their political support both at the United Nations and in the intergovernmental bodies of the agencies concerned if it is to be implemented effectively." *Id.* ¶ 76.

Replying during 1995 in his *Supplement to the Agenda for Peace*, the Secretary-General observed:

[T]here is an urgent need for action to respond to the expectations raised by Article 50 of the Charter. Sanctions are a measure taken collectively by the United Nations to maintain or restore international peace and security. The costs involved in their application, like other such costs (e.g., for peacemaking and peace-keeping activities), should be borne equitably by all Member States and not exclusively by the few who have the misfortune to be neighbors or major economic partners of the target country.⁴⁵⁵

In invoking the concept of “expenses of the Organization,” the Secretary-General has suggested the applicability of Article 17(2) of the Charter, which provides that “the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.”⁴⁵⁶ One might surmise that this was an invitation to the General Assembly to take action under its budgetary authority—perhaps by adopting a kind of tax credit for affected states, under which the apportioned share under Article 17 of an unaffected states’ costs of the Organization would be augmented and retransferred to states. If the Assembly were to proceed in this direction, the justiciability of the “claims” of Member States—that, in the Secretary-General’s words, are “suffering collateral damage”⁴⁵⁷—may soon be ripe for analysis.

2. A Lost Right of Withdrawal?

But if Article 50 were reconstructed to establish a right to compensation, part of its text might be considered anomalous. Giving both members and non-members of the U.N. the right to compensation would be far more incoherent than simply giving both the right to request compensation, as Article 50’s text provides.

A resolution of this inconsistency might lie in the universalist tendencies of the Charter as a supranational constitution, for the claim that the Charter is now better understood as a constitution is the same as saying that it confers rights and imposes duties even on those within the polity who have not given their actual consent to being governed under it.⁴⁵⁸ By parity of reason, Article 49 may also be given new meaning—establishing a duty for nonmembers, as well as members, to “join in affording mutual assistance in carrying out the measures decided by the Security Council.”⁴⁵⁹ Article 2(6)’s mandate that “[t]he Organization shall ensure that states which are not members of the United Nations

455. SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 73.

456. In 1962, the ICJ concluded in the *Certain Expenses of the United Nations Case*, that peacekeeping activities (although not specifically authorized by the Charter) were within the implied powers of the Organization and thus their costs were “expenses of the Organization” for purposes of Article 17. See Advisory Opinion No. 49, *Certain Expenses of the United Nations*, 1962 I.C.J. Rep. 151.

457. See SUPPLEMENT TO AGENDA FOR PEACE, *supra* note 76, ¶ 74. Surely General Assembly action apportioning costs to members on the basis of Article 50 would also be within the teaching of the ICJ’s 1962 opinion with respect to peacekeeping.

458. As Weiler argues in relation to the emergence of a supranational constitution for the EC, *see, supra* text accompanying notes 144–46, and Amar and Beer recognize in relation to the emergence of federalism in the United States, *see supra* text accompanying notes 161–72, the extinction of a right of withdrawal is a critical feature in the dynamic of constitutionalism. It is unlikely that an integration of separate communities, separate peoples, will ever be sufficiently achieved to make constitutionalism a useful construct for supranational society unless they perceive there is no right to exit.

459. U.N. CHARTER art. 49.

act in accordance with [its] Principles so far as may be necessary for the maintenance of international peace and security,"⁴⁶⁰ would then also reach compliance not only with the Charter's "Principles" but with all its pronouncements.

How strong, then, is the received view that a state can withdraw from the Organization? The text and legislative history of the Charter never made more than a weak case for the existence of a right to withdrawal. The text alone points in the direction of foreclosing a right of withdrawal,⁴⁶¹ and some have seen the legislative history as sufficiently ambiguous to warrant not disregarding its import.⁴⁶² Yet the *travaux préparatoire* does seem to make out a case that cannot be ignored. Initially, because the Charter was seen more as a constitutive instrument than a typical treaty, there appears to have been a consensus not to include a provision on withdrawal.⁴⁶³ Rather, the interpretive statement agreed in the committee addressing membership issues stated that "withdrawal or some other form of dissolution of the Organization would become inevitable if . . . the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice."⁴⁶⁴ Later in the negotiations, when it became clear that Charter amendments would only be procured through a rigid, formal process as set forth in Articles 108 and 109 in which the veto of the Great Powers might foreclose constitutional change, there was pressure to reconsider the question of withdrawal.⁴⁶⁵ It was only then that the interpretive statement was revised to state that it was "not the purpose of the

460. See U.N. CHARTER art. 2, para. 6.

461. Based on the text alone, a technical argument might be made that the absence of a withdrawal clause places members within the regime of the customary law of treaty interpretation, as codified by the Vienna Convention on the Law of Treaties. Article 56 states:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
(b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

Vienna Convention, *supra* note 49, art. 56, ¶ 1. The rule stated here thus establishes a presumption against withdrawal.

Another possible argument might be drawn from reading this textual silence in the context of the explicit provision authorizing withdrawal from the League of Nations. See GOODRICH ET AL., *supra* note 38, at 74-75; see also Vienna Convention, *supra* note 49, art. 31 (expressly placing context, presumably including the inferences that might be drawn from the differences between an instrument and the instrument it was intended to replace, a step above negotiating history in the hierarchy of sources for treaty interpretation). On this theory, the Charter's silence on the issue of withdrawal should be read as reversing the right of withdrawal available under the League Covenant.

462. See Kelsen, *supra* note 71, at 129 n.1 (4th ed. 1964). In a five-page long footnote, Kelsen uncovers conflicting statements in Executive Branch testimony before the U.S. Senate in relation to the right to withdraw from the Charter—some clearly indicating that the Charter was not intended, like the United States, to be a consolidation of sovereignty so that a right of withdrawal or secession would be retained; others suggesting that the intent of the negotiating history was to overturn the right of withdrawal provided for in the League Covenant. Ultimately, Kelsen concludes that, if the rule on withdrawal stated in the interpretive statement did not in fact encourage withdrawal, "there was no reason not to insert . . . [it] in the Charter." *Id.* at 133 n.1. It followed, for Kelsen, that general rules on withdrawal would apply, and that, under settled principles, there was no right to withdraw from a treaty of indefinite duration. *Id.*

463. Cf. GOODRICH ET AL., *supra* note 38, at 75.

464. See *id.* *supra* note 38, at 75 (quoting UNCIO, Documents, VII, 123). Thus, the reasonable inference from this language is that "withdrawal" was perceived as permissible as a variant of the "dissolution" of the Organization because of its fundamental failure to meet its objectives—in effect, a "legitimation crisis." See JÜRGEN HABERMAS, LEGITIMATION CRISIS 69 (Thomas McCarthy trans., 1975) ("If governmental crisis management fails, it lags behind programmatic demands that it has placed on itself. The penalty for this failure is withdrawal of legitimation.") (emphasis in original).

465. See GOODRICH ET AL., *supra* note 38, at 75.

Organization . . . 'to compel' a member to continue its membership if 'because of exceptional circumstances,' it felt 'compelled to withdraw.'"⁴⁶⁶

Thus, although the legislative history does make out a plausible case for a conditional right of withdrawal, that right is implicitly connected with limits that the early Charter system imposed on constitutional change. If, as argued here, the possibilities for Charter amendment include an informal, non-textual track, it may be defensible to reconstruct the Charter's conditions for withdrawal. The precedents of withdrawal would then be irrelevant, for even though Indonesia temporarily withdrew on account of its objections to the results of a U.N. fact-finding mission confirming Northern Borneo inhabitants' desire to join with Malaysia,⁴⁶⁷ the critical point is that Indonesia returned shortly thereafter.⁴⁶⁸ It is now time to return to the earliest view of withdrawal expressed in the negotiating history, when the veto had not reared its ugly head in the provisions governing formal amendment and, thus, the possibilities of constitutional change had not been foreclosed. Under this revised understanding, withdrawal would then be a right only when the Charter no longer functions as the embodiment of a constitutional community.

VIII. EPILOGUE: A NEW POLITY, A NEW CONSTITUTION, BUT A FAILED GOVERNMENT—WHY?

We have been on the way to the forum—a new civic forum foreseen by Wolff as the *civitas maxima*—that may be the "glimpse of a greater vision" U.S. Permanent Representative to the U.N. Madeleine Albright shared with the Security Council.⁴⁶⁹ But what have we found upon arriving? A world government in which collective action is now legitimate but in which the action has failed to achieve our highest aspirations. Was it simply because of a lack of collective resources or political will? Or can it be traced also to a defect in the principles constituting our new world government?

One might say that the argument from utility sees the supranational community as no more, and no less, than the sum of its parts. The states could just as well not exist, since it is only a question of efficiency. Happily, we are not there yet. The argument from liberty sees the supranational community as more than the sum of its parts. Some progress has been made in that direction in the procedural aspects of supranational government, but much work needs to be done to connect this argument with substantive policy-making. Current patterns seem at least as inclined to favor ethnically-based tyranny as pluralist democracy. The argument from community, by elevating minority communities to a central place in the firmament of international law, may see the supranational community as less than the sum of its parts.

This argument raises the question: What kind of supranational constitution have we created? Is minority group autonomy so intimately connected with the argument from community, and thus corporatist politics, that that government we have emplaced at Turtle Bay (the home of the U.N. in New York) is condemned to pursue antidemocratic solutions to civil wars in today's states, even though a form of deliberative democracy is emerging to restrict unilateral intervention by hegemonic states? Was the theory grounding the new supranational constitution predestined to engage the U.N. in a form of intervention that

466. See *id. supra* note 42, at 75 (quoting from UNCIO, Documents, VII, 328 (report of Committee I/2)).

467. See EVAN LUARD, 2 A HISTORY OF THE UNITED NATIONS: THE AGE OF DECOLONIZATION 1955–1965, 348–56 (1989).

468. See RATNER, THE NEW UN PEACEKEEPING, *supra* note 304, at 114 (noting the pullout was only "temporary").

469. U.N. Doc. S/PV.3271, *supra* note 390, at 17; see also *id.* at 17–18 (celebrating, prematurely it turned out, the success of the Governors Island Accord of 1993 in restoring democracy to Haiti).

encouraged, for example, secession and war in Yugoslavia rather than federalist integration and pluralist politics? For four long years this seemed to be the case. And recent efforts by the United States and E.U. in Balkan peacemaking may not have overcome the disintegrative impact of U.N. policy over this period.⁴⁷⁰

In sum, the disintegrative tendencies of the principles of the recent informal amendments to the U.N. Charter are not settled features of the supranational constitution, which may need to be reconsidered by, if necessary, a formal process of amendment. It may not be enough to oppose Boutros Boutros-Ghali's reelection as Secretary-General.⁴⁷¹ Constitutional politics isn't necessarily a once-in-a-lifetime experience.

470. See General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, December 14, 1995, Bosnia-Herzegovina-Croatia-Yugoslavia, 35 I.L.M. 75 (with Introductory Note by Paul C. Szasz).

The Constitution of the new Bosnia-Herzegovina, for example, speaks of "Bosnians, Croats, and Serbs, as constituent peoples" who have created a state constituted by "two Entities, the Federation of Bosnia and Herzegovina and Republika Srpska." *Id.* at 118-19 (BOSNIA & HERZEGOVINA CONST. Annex 4, pmbl., art. I.3). Whether the agreement is a precursor to deliberative democracy along a pluralist model, facilitating a true union of peoples, or full-blown corporatism, inciting incipient secession, is ambiguous. For example, Article III.2(a) of the Constitution provides that "The Entities shall have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina." *Id.* at 120. Similarly, Article III.2(d) provides that "Each entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreement do not require such consent." *Id.* The Constitution thus, while it favors union, leaves the door open to de facto secession.

Can the supranational community influence the outcome? As Paul Szasz observes, "[i]t should be recognized that all the international forces and organs . . . foreseen by these Agreements, are not created by these or by any other instruments formulated in Dayton, but rather by later decisions of various international organizations, in particular the United Nations and NATO; the Agreements technically merely constitute the consent of the parties thereto to have such forces and organs carry out specified functions within Bosnia and the region." *Id.* at 77 (Introductory Note). Thus, when the question of the internal character of the new Bosnia and Herzegovina ripens, the supranational community will need finally to decide whether to employ Chapter VII and VIII authority, not as it already has to preserve peace and human rights in the Balkans, but to ensure the triumph of a pluralist conception of domestic order.

471. See John M. Goshko, *Boutros-Ghali to Seek Another Term at U.N.; U.S. Opposes Bid, Threatens to Use Veto to Block Reelection*, WASH. POST, June 20, 1996, at A1 (reporting the U.S.'s opposition to Boutros-Ghali's reelection, publicly based on Boutros-Ghali's alleged failures as a manager of the U.N. system, notwithstanding broad-based international support for another term). The U.S. position is not surprising given the extraordinary public challenge Boutros-Ghali has earlier leveled at those in the U.S. who blamed the continuing crisis in the Balkans on the U.N. See Boutros Boutros-Ghali, *Global Leadership After the Cold War*, FOREIGN AFFAIRS, Mar.-Apr. 1996, at 86, 95 ("The United Nations cannot expect to avoid being used as a scapegoat in the future, and as Secretary-General I have unfortunately had to endure such treatment on occasion. But member states cannot use the United Nations to avoid a problem and then blame the United Nations for failing to solve it, and the Secretary-General cannot permit them to do so.").

In vetoing Boutros-Ghali's reelection, the United States might well also have been motivated by the expansive rhetoric Boutros-Ghali himself used in his reelection campaign. *Id.* at 87 ("History reveals that those caught up in revolutionary change rarely understand its ultimate significance."). The Secretary-General described the new features of the supranational constitution as *faits accomplis*. See *id.* at 88 ("[T]he conferences convened since 1992 represent something new and different. They are linked. They are cumulative. They foster global consensus on interlocking global issues. They generate specific commitments. And they provide a comprehensive framework for international action in fields that are drastically affected by the negative side of globalization . . ."), *id.* at 92 ("With many in the international community inclined to turn inward after decades of global ideological confrontation, . . . [t]he Secretary-General has a moral responsibility to call the world's attention to these orphan conflicts. . ."), and *id.* at 94 ("[The Secretary-General] can encourage regional organizations to act as surrogates of the United Nations. As Secretary-General I have actively sought the involvement of regional arrangements and agencies. Chapter VIII of the Charter allows such cooperation and permits great flexibility in this regard."). And he reiterated his call for taxing power that would permit the U.N. to embark on the redistributive programs suggested by his earlier discussion of Article 50. Compare *id.* at 97 ("it is reasonable to contemplate the creation of some procedure by which the organization could regularly collect a relatively small amount from one of the many daily transactions of the global economy.") with *supra* text accompanying notes 455-57 (discussing transfer to countries specially affected by collective enforcement).